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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BERNARD M. BARRETT, JR., M.D., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A.,
Petitioner

v.

UNITED STATES OF AMERICA and MICHAEL O. HANSON, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 15, 1988

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I

QUESTION PRESENTED

1. Do federal district courts have the jurisdictional authority to condition enforcement of I.R.S. summonses to prevent the I.R.S. from utilizing a summons or the information procured by it to make illegal disclosures of "return information" in violation of I.R.C. (26 U.S.C.) § 6103?

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1. The caption of this case contains the names of all parties to this proceeding. Petitioner Plastic and Reconstructive Surgeons, P.A., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the split decision of the United States Court of Appeals for the Fifth Circuit sitting en banc in this matter (Fifth Circuit No. 85-2054) and entered on February 24, 1988, which, as more fully discussed herein, is in direct conflict with prior decisions of the United States Supreme Court and two recent cases from the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Fifth Circuit Opinions

The February 24, 1988, en banc opinion of the Fifth Circuit is reported at 837 F.2d 1341 (5th Cir. 1988) (*"Barrett III"*) and appears in the appendix hereto at A-3.

It includes the majority per curiam decision, a concurring in part and dissenting in part opinion by Judges John R. Brown, Henry A. Politz, Sam D. Johnson, and Jerre S. Williams, and a separate dissenting opinion by Judges Alvin B. Rubin and E. Grady Jolly. The Fifth Circuit order granting a rehearing en banc is reported at 812 F.2d 936 (5th Cir. 1987) and appears in the appendix hereto at A-42. The prior Fifth Circuit panel decision of December 3, 1986, withdrawn by reason of the en banc rehearing, is reported at 804 F.2d 1376 (5th Cir. 1986) (*"Barrett II"*) and appears in the appendix hereto at A-44. It includes a per curiam opinion, a concurring opinion by the late Judge Robert M. Hill and Judge Thomas M. Reavley, and a separate concurring opinion by Judge John R. Brown. Another prior Fifth Circuit panel decision in this case, entered on April 16, 1986, withdrawn by reason of granting Dr. Barrett's petition for rehearing, is reported at 787 F.2d 958 (5th Cir. 1986) (*"Barrett I"*) and appears in the appendix hereto at A-57. It includes a majority opinion and a separate concurring in part and dissenting in part opinion by Judge John R. Brown.

District Court Rulings

The Findings of Fact and Conclusions of Law and Final Judgment entered by the United States District Court for the Southern District of Texas on December 10, 1984, are not reported and appear in the appendix hereto at A-73. The district court's Memorandum and Order of December 19, 1984, denying a motion for stay of execution of judgment appears in the appendix hereto at A-79. The district court's Memorandum and Order of January 4, 1985, denying a motion to reconsider its order denying stay appears in the appendix hereto at A-81. The district court's Memorandum and Order of

January 10, 1985, denying a motion for new trial appears in the appendix hereto at A-84.

Companion Cases

The companion case of *United States v. Texas Heart Institute*, reported at 755 F.2d 469 (5th Cir. 1985), appears in the appendix hereto at A-86. The unreported district court decision in *Texas Heart* on remand appears in the appendix hereto at A-114.

The companion case of *Barrett v. United States*, reported at 795 F.2d 446 (5th Cir. 1986), appears in the appendix hereto at A-118.

JURISDICTION

The en banc judgment of the Fifth Circuit sought to be reviewed was entered on February 24, 1988, and the mandate of that judgment has been stayed until April 17, 1988, pending the filing of this petition. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV (Appendix A-131)
U.S. Constitution, Amendment V (Appendix A-131)

Internal Revenue Code Sections:

26 U.S.C. § 6103(a) (Appendix A-132)
26 U.S.C. § 6103(b)(2)(A) (Appendix A-133)
26 U.S.C. § 6103(k)(6) (Appendix A-138)
26 U.S.C. § 7213 (Appendix A-138)
26 U.S.C. § 7402 (Appendix A-142)
26 U.S.C. § 7431 (Appendix A-143)
26 U.S.C. § 7602 (Appendix A-146)
26 U.S.C. § 7604 (Appendix A-149)

STATEMENT OF THE CASE

The Taxpayer's Business

Bernard M. Barrett, Jr., M.D., petitioner herein, is a plastic and reconstructive surgeon who has practiced in the Texas Medical Center in Houston, Texas since completing his education and training in 1975. He incorporated his medical practice in 1978 into a professional association named Plastic and Reconstructive Surgeons, P.A. (3-R. 55). The nature of the plastic and reconstructive surgery and treatment performed by Dr. Barrett causes most of his patients to demand absolute confidentiality with regard to their treatment or surgery and Dr. Barrett promises such confidentiality to his patients (3-R. 42-43).

Administrative Activity of the Internal Revenue Service

The I.R.S. civil audit examination which began in July of 1979 covered Dr. Barrett's personal tax returns for 1976, 1977 and 1978 and his corporate tax return for the fiscal year ended March 31, 1979. Dr. Barrett cooperated fully in the civil audit examination and provided the examining revenue agents with complete access to all of his business records (3-R. 11-12, 15, 33-34, 43, 47; 4-R. 75). After certain factual events which are disputed but not necessary for this petition, Revenue Agent Helen Curtis-Brown referred the case to the Criminal Investigation Division of the Internal Revenue Service on February 17, 1981 (4-R. 8).

After the referral to the Criminal Investigation Division, Dr. Barrett's case was first assigned to Special Agent George Robson and then reassigned to Special Agent

Michael O. Hanson in December of 1981 (2-R. 27-28, 64). Beginning in June of 1982, Special Agent Hanson began a massive summoning of records and interviewing of third-parties. Special Agent Hanson served summonses on every financial institution from Florida to California with which Dr. Barrett, his wife or children had done business or had accounts, including some institutions with which Dr. Barrett and his family had never done business (3-R. 48-49). Special Agent Hanson also contacted individuals with whom Dr. Barrett had never done business (3-R. 48-49). Dr. Barrett never once attempted to stop such summoned or contacted third-parties from providing information to the Internal Revenue Service (3-R. 48).

The Hospital Summonses and the Related Case of *U.S. v. Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985)

However, also in June and July of 1982, Special Agent Hanson summoned sixteen (16) hospitals for the names and addresses of patients Dr. Barrett had admitted to such hospitals for the five year period of 1976 through 1980. Dr. Barrett learned from administrators and legal counsel for such hospitals that Special Agent Hanson was attempting to obtain the names and addresses of his patients from their medical records divisions (4-R. 58). Special Agent Hanson had also issued the summons involved in the instant case to Dr. Barrett on June 17, 1982, requesting that he produce records that had previously been examined and to add thereto all of his records for the subsequent years of 1979 and 1980 (1-R. 130-138). Because of concern for the confidentiality rights of the patients, Dr. Barrett's attorneys and attorneys for four (4) hospitals where Dr. Barrett primarily practices de-

cided not to comply with the summonses in order to contest the validity of Special Agent Hanson's summonses and proposed actions in summons enforcement proceedings in federal district court (4-R. 58-59).

Prior to seeking enforcement of the four (4) hospital summonses or the summons for Dr. Barrett's records in this case, Special Agent Hanson, on March 11, 1983, mailed approximately three-hundred fifty (350) identical letters to patients whose names and addresses he obtained from the other hospitals that did comply with their summonses (2-R. 42, 43, 59). The letters disclosed that Dr. Barrett was under criminal investigation by the Internal Revenue Service and requested various forms of evidence of payments to Dr. Barrett (1-R. 8, Exhibit 1(D) (copy of letter); 2-R. 42). Special Agent Hanson's mailing of the approximate three hundred fifty (350) letters was the first step in his plan to mail such letters to one-hundred percent (100%) of Dr. Barrett's patients for the five year period of 1976 through 1980, the entire first five years of Dr. Barrett's private practice (2-R. 39-40).

The government first chose to seek enforcement of only the summonses to the four (4) hospitals that had decided not to comply with their summonses rather than consolidate Dr. Barrett's summons matter with the hospital summons proceedings. The petitions to enforce the four (4) hospital summonses were not filed until June 21, 1983, almost one year after they were issued, and Dr. Barrett was allowed to intervene. These proceedings resulted in the Fifth Circuit decision in *United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985); Appendix, A-86, *infra.*

At the original district court hearing in *Texas Heart* on December 2, 1983, before U.S. District Judge Norman W. Black, Special Agent Hanson testified that prior to the mailings he knew the letters would possibly cause Dr. Barrett's patients "embarrassment, humiliation, or distress" or to be "upset" (2-R. 50, 69). Special Agent Hanson also testified that he could understand the patients being "upset" but he was not aware of how that would harm Dr. Barrett's medical practice and that he would mail further letters to patients admitted to the respondent hosptials "irrespective of the harm it would do to Dr. Barrett's medical practice" (2-R. 69). Revenue Agent Curtis-Brown later testified in the instant case that Dr. Barrett's records reflected all of his income "in one form or another," even if some was not reported on the tax returns (4-R. 82, 104).

The district court in *Texas Heart* denied enforcement of the hospital summonses. The Fifth Circuit reversed on March 21, 1985, but remanded the case to the district court to determine if Special Agent Hanson's desire to continue the mass mailings disclosing that Dr. Barrett was under "criminal investigation" would (1) be a disclosure of information within the definition of "return information" in section 6103(b)(2)(A), and (2), if so, whether the I.R.S. is authorized to disclose such information under section 6103(k)(6).[1] *Texas Heart*, 755 F.2d at 482; Appendix, A-112, *infra*. Most pertinent to this petition for certiorari, the Fifth Circuit further stated that "[t]his Court reiterates that even if the past disclosure [Agent Hanson's prior mailing] was improper, *the district court has discretion to condition enforcement of the sum-*

1. All references herein are to sections of the Internal Revenue Code, 26 U.S.C.

mons by requiring that the I.R.S. agree to desist from further unlawful disclosures." Id. (emphasis added).

On remand in *Texas Heart* Judge Black held that Special Agent Hanson's prior letters were "irresponsible," and that they did disclose "return information" by disclosing Dr. Barrett was under criminal investigation. *See* unreported decision of *Texas Heart* on remand. Appendix A-114, 115-117, *infra.*

Dr. Barrett's Civil Damage Action Resulting in the Related Case of *Barrett v. United States,* 795 F.2d 446 (5th Cir. 1986)

In November of 1983, Dr. Barrett filed a civil damage action against the government under section 7431 primarily as a result of Special Agent Hanson's 350 letters to his patients unnecessarily disclosing the "return information" that he was under criminal investigation. This action resulted in the Fifth Circuit decision of *Barrett v. United States,* 795 F.2d 446 (5th Cir. 1986); Appendix, A-118, *infra,* which reversed a summary judgment for the government and remanded the case for trial. Therein, the Fifth Circuit held there were genuine issues of fact of (1) whether the information sought by Special Agent Hanson's letters was "otherwise reasonably available" within the meaning of section 6103(k)(6) (i.e., from bank records and Dr. Barrett's records) and, (2) if the letters had to be sent at all, whether the "disclosure of return information that the taxpayer was under investigation, particularly criminal investigation, was 'necessary,'" as required by section 6103(k)(6). *Barrett v. United States,* 795 F.2d at 450-451; Appendix, A-127-128, *infra.* The damage action is pending trial on remand in the district court at the date of this petition.

The Instant Summons Proceeding Against Dr. Barrett Resulting in the En Banc Decision Sought to be Reviewed

After Judge Black originally denied enforcement of the four (4) hospital summonses in *Texas Heart,* and a year and one-half after the summons to Dr. Barrett was issued, the government filed the petition to enforce the summons to him under section 7402(b). At the ensuing enforcement proceedings before U.S. District Judge James DeAnda on March 12, 1984, Special Agent Hanson testified that he could perform his job without continuing the mass mailings to Dr. Barrett's patients, i.e., that his contact with Dr. Barrett's patients could be "on a more selective basis" because he could use Dr. Barrett's records and bank records (microfilm copies of deposited patient checks referred to as "transit items") to "cross-reference" patient names and payments to determine if it was necessary to contact any particular patients (4-R. 28-29). However, at the continued proceeding on March 19, 1984, Special Agent Hanson evidenced his intent to continue the mass mailings by inconsistently, and incorrectly (1-R. 8, Exhibit 1(C)), testifying that banks destroy such "transit items" after two years (5-R. 11). It is also pertinent to note here that subsequently, at the July 26, 1985, hearing on remand in *Texas Heart,* Special Agent Hanson further evidenced his intent to continue the mass mailings (*Texas Heart* on remand, Appendix A-117, *infra*).

At the March 12, 1984, hearing in the instant summons case, Judge DeAnda commented preliminarily that he "would certainly put some very stringent limitations on any future patient contact" by the I.R.S. (4-R. 117). However, in his December 10, 1984, Findings of Fact and Conclusions of Law and Final Judgment, Judge

DeAnda enforced the summons entirely without putting any limitations on future patient contact (1-R. 67-72; Appendix A-73-78, *infra*). Judge DeAnda's findings and conclusions were based on the incorrect perception that the factual issue was whether the I.R.S. was going to disclose Dr. Barrett's business records to his patients, as opposed to the issue of the mass disclosure to the patients that Dr. Barrett was under "criminal investigation" (1-R. 6-7, 70; Appendix A-75, 82-83, *infra*).

On appeal, the Fifth Circuit issued the conflicting panel decisions of April 16, 1986, at 787 F.2d 958 (*"Barrett I"*); Appendix, A-57, *infra,* and December 3, 1986, at 804 F.2d 1376 (*"Barrett II"*); Appendix A-44, *infra. Barrett I* affirmed the unconditional enforcement of the summons and *Barrett II* remanded the case to the district court under the law of *Texas Heart* for consideration of "whether enforcement of the I.R.S. summons should be conditioned in order to protect Barrett against unnecessary disclosure of the [return information] that he is under criminal investigation." *Barrett II,* 804 F.2d at 1379; Appendix A-49, *infra.* (Also on this issue, see the separate concurring opinion of Fifth Circuit Judge John R. Brown, *Barrett II,* 804 F.2d at 1380-81, Appendix A-53-56, *infra,* and his prior panel dissenting opinion, *Barrett I,* 787 F.2d at 962-965; Appendix A-64-72, *infra.*)

In the February 24, 1988, en banc decision, the Fifth Circuit considered the issue presented in this petition and, *sua sponte,* whether the appeal was moot.[2] Regarding the

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2. *Barrett III,* 837 F.2d at 1345-48; Appendix A-10-18, *infra.* Judges Brown, Politz, Johnson and Williams expressly concurred with the majority that the case was not moot. *Barrett III,* 837 F.2d at 1351-52; Appendix A-26, *infra.* Dr. Barrett cited the following authority in his supplemental brief, requested by the court, contending the case was not moot, which required the Fifth Circuit's ruling

issue presented in this petition, the Fifth Circuit majority opinion specifically held that federal district courts do not have the power to conditionally enforce I.R.S. summonses to protect confidentiality rights of taxpayers under section 6103 and expressly overruled its prior *Texas Heart* holding to the contrary. *Barrett III*, 837 F.2d at 1350-51; Appendix A-21-26, *infra*. It is the latter holding from which Fifth Circuit Judge John R. Brown "vigorously" dissented and was joined by Fifth Circuit Judges Henry A. Politz, Sam D. Johnson, and Jerre S. Williams. *Barrett III*, 837 F.2d at 1351-1358; Appendix A-26-40, *infra*.

REASONS FOR GRANTING THE WRIT

There are three reasons why this case warrants the plenary consideration of the United States Supreme Court. First with regard to conflicts with prior decisions of this Court, the Fifth Circuit's majority opinion improvidently rejects this Court's direction in *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248 (1964), that federal district courts have the power and obligation to prevent an abuse of their process with respect to an I.R.S. summons. It further denies the judicial remedy of "complete protection" afforded summoned taxpayers by this Court's landmark holding in *Reisman v. Caplin*, 375 U.S. 440, 84 S. Ct. 508 (1964). The Fifth Circuit's majority opinion

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that the case was not moot: *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 1183 (1982) (and cases cited therein); *F.T.C. v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) (Brown, C.J.); *Atlantic Richfield Company v. F.T.C.*, 546 F.2d 646, 648-50 (5th Cir. 1977) ("Due process remedy" of *Reisman v. Caplin*, 375 U.S. 440 (1964) applied to prevent mootness after compliance with subpoena because order could be entered to prevent future disclosures); *accord, Anheuser-Busch, Inc. v. F.T.C.*, 359 F.2d 487 (8th Cir. 1966) (provisions of I.R.C. construed in *Reisman* held *in pari materia* with Federal Trade Commission Act) (Blackmun, J.).

also misapplies this Court's prior decision in *United States v. Arthur Young & Co.*, 465 U.S. 805, 104 S. Ct. 1495 (1984) (and the other prior decisions of this Court discussed therein) by its holding that the confidentiality statutes of the Tax Reform Act of 1976 do not constitute the "sort of unambiguous directions from Congress" which authorize a district court to place restrictions on a summons. Second, the Fifth Circuit's majority opinion is in direct conflict with two Ninth Circuit cases which uphold, under the authority of *Powell,* the jurisdictional authority of federal district courts to conditionally enforce I.R.S. summonses to protect section 6103 confidentiality rights of taxpayers. Uniform application of the federal statutes governing the summons power of the Internal Revenue Service in relation to the confidentiality rights of taxpayers, combined with the uniform exercise of federal court jurisdiction over such matters, are appropriately substantial results this Court would obtain by resolving the direct conflict between the two circuit courts of appeal. Third, the Fifth Circuit's majority opinion thwarts the broad concern and determination of Congress that confidential "return information" not be disclosed except under strictly limited circumstances.

I.

The Fifth Circuit's Decision Rejects this Court's Landmark Holdings in *United States v. Powell* and *Reisman v. Caplin* and Misapplies this Court's Prior Decision in *United States v. Arthur Young & Co.*

a. The Fifth Circuit's Rejection of *Powell* and *Reisman.*

In *United States v. Powell* this Court very clearly held that even after the government shows it meets the often

quoted four-pronged criteria of *Powell* for enforcement of an I.R.S. summons, such showing:

> does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he "may challenge the summons on any appropriate ground," *Reisman v. Caplin*, 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. *It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.*

Powell, 379 U.S. at 58, 85 S. Ct. at 255 (footnotes omitted) (emphasis added). With regard to the holding of the Fifth Circuit majority:

> that the United States District Court in the exercise of its residual, equitable discretion, may not, and has no power to, condition enforcement of the summons to prevent the disclosure of return information by the I.R.S. in utilizing the summons (or information procured by it),

Barrett III, 837 F.2d at 1352; Appendix A-26-27, *infra*, Judge Brown correctly demonstrates that such holding:

> rejects the Supreme Court's emphasis in Powell that in the application for enforcement of an I.R.S. summons, 'it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.'

Id.

The Fifth Circuit's decision erroneously constrains district courts from preventing an abuse of their process because it adopts the government's position that district courts are powerless to do anything but make an all or

nothing ruling when presented with a petition to enforce an I.R.S. summons, i.e., "[t]he district court does not have the power to conditionally enforce the summons . . . [t]here is no middle ground . . . the only issue that a district court can decide is whether to enforce the summons." *Barrett III*, 837 F.2d at 1350, 1351, Appendix A-22, 25, *infra*. In the context of this case, Judge Brown below and Dr. Barrett here contend the Fifth Circuit's decision improperly allows the process of the district court to be abused because "the result of the court's opinion . . . is that the district court is required not only to enforce a summons without any statutory necessity but to stand idly by while the I.R.S. subjects a taxpayer to the ridicule and humiliation of being labeled as a criminal tax evader in the eyes of his fellows . . . with no criminal charge yet filed much less tried." *Barrett III*, 837 F.2d at 1357; Appendix A-38, *infra*. Furthermore, the expressly admitted result of the Fifth Circuit's holding is that a district court cannot prevent the I.R.S. from using an illegal means to conduct its investigation. Specifically, the existence of a subsequent civil damage action under section 7431 and a criminal prosecution of government agents under section 7213 for illegal disclosures are given as reasons for the holding that district courts do not have the power to prevent illegal disclosures. *Barrett III*, 837 F.2d at 1350; Appendix A-21, *infra*.

The Fifth Circuit's rejection of the important requirement of *Powell* that a district court "may not permit its process to be abused" is also clear in light of this Court's prior decision in *Reisman*. Therein, this Court held that taxpayers may not initiate an action in federal district court to contest an administrative summons, but their "*adequate remedy at law*," according to the comprehensive procedures of the Internal Revenue Code, is to await

an action initiated by the government to enforce its summons under section 7402(b). *Reisman*, 375 U.S. at 443, 445-446, 84 S. Ct. at 510, 512. In demonstrating that such a remedy is *"adequate,"* this Court further observed that both the "parties summoned" and those affected by production of the summoned information may "challenge the summons by asserting their constitutional or other claims." 375 U.S. at 445, 84 S. Ct. at 511. This Court further observed therein that "[a]ny enforcement action under [section 7402(b)] would be an adversary proceeding affording a judicial determination of the challenges to the summons *and giving complete protection to the* [*parties summoned*]." 375 U.S. at 446, 84 S. Ct. at 512 (emphasis added). Therefore, the reference in *Powell* to the culminating language in *Reisman* that a taxpayer "may challenge the summons on any appropriate ground" with the emphasis in *Powell* that a district court "may not permit its process to be abused" determines that federal district courts have the jurisdictional power and are required to provide "complete protection" of a respondent taxpayer's substantive rights, including section 6103 rights. *Anheuser-Busch, Inc. v. F.T.C.*, 359 F.2d 487, 489-90 (8th Cir. 1966) (Blackmun, J.); *Atlantic Richfield Co. v. F.T.C.*, 546 F.2d 646, 648-650 (5th Cir. 1977). The Fifth Circuit's majority opinion in this case diminishes the power of federal district courts to provide the "complete protection" of substantive rights intended by *Powell* and *Reisman* and diminishes the power of federal district courts intended by Congress in section 7402(a) as recognized by the Ninth Circuit in *United States v. Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986).

As Judge Brown's dissent argues, allowing district courts the power of conditional enforcement does not imperil the streamlined procedure of *Powell* because of

the nature of determinations the district court still must make under the four-pronged criteria of *Powell*. *Barrett III*, 837 F.2d at 1356-57; Appendix A-37-38, *infra*. In his original dissent in *Barrett I*, Judge Brown explained that "[t]he determination of whether there exists a legitimate investigative purpose for the summons is certainly not far removed from the determination of whether the practices flowing from its enforcement are an unnecessary invasion of privacy or threaten injury to a taxpayer's reputation." *Barrett I*, 787 F.2d at 964; Appendix A-70, *infra*. In this regard, this Court has often held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 252 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 87 S. Ct. 675, 683 (1967). The Fifth Circuit's decision is inconsistent with such long established principle which can and is required to be observed within the streamlined procedure of *Powell* as demonstrated by Judge Brown below. Additionally, with regard to the task of the district court in making the required determinations under *Powell*, the Fifth Circuit's majority opinion simply holds that "if good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied . . . there is no middle ground . . ." *Barrett III*, 837 F.2d at 1350; Appendix A-22, *infra*. Such holding, however, fails to acknowledge the second, third and fourth criteria of *Powell* the district court must determine, which are: "that the inquiry may be relevant to the purpose, that the information sought is not already within the I.R.S.'s possession, and that the administrative steps required by the Code have been

followed." *Powell,* 379 U.S. at 57-58, 85 S. Ct. at 255. The required determination under the third criteria "that information sought is not already in the government's possession" is similar in nature to the restrictive requirement under section 6103(k)(6) that the disclosure of return information is only permissible to the extent "necessary" to obtain information "not otherwise reasonably available." Furthermore, section 6103 is within Subtitle F of the Internal Revenue Code, entitled "Procedure and Administration," which contains the "administrative steps required by the Code" referred to in the fourth criteria of *Powell.* Certainly the streamlined procedure under *all four* criteria of *Powell* would not be imperiled by a determination that it is illegal under section 6103 to disclose to all of a taxpayer's customers that he or she is under criminal investigation.

The "adequate" judicial remedy of "complete protection" required to be afforded taxpayers in a government initiated summons enforcement proceeding via the exercise of a district court's jurisdictional authority called for and mandated by *Powell* and *Reisman* (and the "comprehensive procedures of the Internal Revenue Code" discussed therein) is the kind of "prior hearing" this Court has held many times to be constitutionally required prior to the deprivation of significant rights, i.e., a predeprivation due process of law remedy. E.g., *Fuentes v. Shevin,* 407 U.S. 67, 92 S. Ct. 1983 (1972) (and cases cited therein). Also, see application of *Reisman* in *Anheuser-Busch, Inc. v. F.T.C.,* 359 F.2d at 489-90 and in *Atlantic Richfield Co. v. F.T.C.,* 546 F.2d at 648-50. The Fifth Circuit's decision improperly denies taxpayers whose records are summoned adequate due process of law protection with regard to their section 6103 rights, which Congress considered to be fundamentally important as demon-

strated in the pertinent legislative history of the Tax Reform Act of 1976 cited by Judge Brown. *Barrett III*, 837 F.2d at 1352-58; Appendix A-27-40, *infra*. Furthermore, this Court has expressly held that the right to follow a chosen profession or engage in specific private employment free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the due process clause of the fifth amendment. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959); *United States v. Robel*, 389 U.S. 258, 270, 88 S. Ct. 419, 427 (1967) (Brennan, J., concurring). As Judge Brown so ably explains, the mass disclosures of the "damning" return information to Dr. Barrett's patients that he is under an I.R.S. criminal investigation affects the goodwill of his medical practice and his capacity to practice his chosen profession, i.e., a property interest and a liberty interest. *Barrett I*, 787 F.2d at 964-65, Appendix A-69-72, *infra; Barrett III*, 837 F.2d at 1357, Appendix A-38-39, *infra*. The obvious legislative purpose of the confidentiality rule of section 6103 was to prevent the I.R.S., prior to any judicial adjudication, from damaging such "property" and "liberty" interests of taxpayers by restricting the manner in which it is allowed to conduct an investigation, such as the requirement of section 6103 (k)(6) that an investigative disclosure of "return information" be "necessary" in order to obtain information that is "not otherwise reasonably available." 837 F.2d at 1356-57; Appendix A-36, *infra*. As in *Fuentes v. Shevin*, the existence of a subsequent damage action in this case (section 7431) does not provide the requisite due process of law protection of such important section 6103 rights afforded by the exercise of a district court's jurisdictional power described in and required by *Powell* and *Reisman*.

The Fifth Circuit's refusal in footnote 2 of its majority opinion, *Barrett III*, 837 F.2d at 1343-44, Appendix A-7, *infra*, to consider the due process issue neglects the fact that Dr. Barrett specifically did assert *Powell* and *Reisman* as authority for the district court's protection of his substantive section 6103 rights and constitutional right to privacy in his "original answer . . . , motion for new trial and in the motion for stay of execution of judgment," as recognized by Judge Brown (1-R. 110-111, 115-119, 57-59, 48-56, 10-12); *Barrett III*, 837 F.2d at 1352; Appendix A-26, *infra*. The Fifth Circuit's position fails to recognize the jurisdictional nature of the judicial protection afforded and required by *Powell* and *Reisman*, which necessarily includes the taxpayer's right to the "adequate" due process of law remedy and "complete protection" this Court discussed in such cases. Therefore, while footnote 2 of the majority opinion correctly characterizes Dr. Barrett's due process argument as "purely a legal issue," it incorrectly fails to recognize that it was and is a jurisdictional argument derived from the very aspects of *Powell* and *Reisman* which the Fifth Circuit rejected as authority for the district court's power to protect section 6103 rights. It is fundamental error for the Fifth Circuit to reject *Powell* and *Reisman* as authority for conditional enforcement to protect section 6103 rights, while expressly refusing to consider the essential due process aspects of the very same case law authority it rejects. *Anheuser-Busch, Inc. v. F.T.C.*, 359 F.2d at 489-90; *Atlantic Richfield Co. v. F.T.C.*, 546 F.2d at 648-50. As a further result, the position taken in footnote 2 ignores the long established principle that jurisdictional issues can always be considered, even *sua sponte*, whether or not raised below. *Newman v. State of Alabama*, 503 F.2d 1320, 1325 (5th Cir. 1974), *reh'g denied*, 506 F.2d 1056, *cert. denied*, 421 U.S. 948,

95 S. Ct. 1680 (1975) ("since . . . issue is jurisdictional, we are required to consider it, despite the failure of the parties to introduce it at any previous stage in the litigation." *Id.*); *Glidden Company v. Zdanok*, 370 U.S. 530, 535-37, 82 S. Ct. 1459, 1464-66 (1962); *United States v. Storer Broadcasting Company*, 351 U.S. 192, 76 S. Ct. 763 (1956). Also, *see Smith v. Grimm*, 534 F.2d 1346, 1349 (9th Cir. 1976), *cert. denied*, 429 U.S. 980, 97 S. Ct. 493 (1976); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333-34 (7th Cir. 1977), *cert. denied*, 434 U.S. 975, 98 S. Ct. 533 (1977).

For the above reasons, Judge Brown is correct in his position that the Fifth Circuit has rejected this Court's holding in *Powell*. The Fifth Circuit's decision is also in conflict with this Court's holding in *Reisman* providing for an "adequate" judicial remedy with "complete protection" for the taxpayer summoned.

b. The Fifth Circuit's Misapplication of *Arthur Young & Co.*

This Court has consistently held that restrictions upon the I.R.S. summons power should be avoided " 'absent unambiguous directions from Congress' ". *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S. Ct. 915, 921 (1975)); *United States v. Euge*, 444 U.S. 707, 715, 100 S. Ct. 874, 880 (1980). Also, *see Donaldson v. United States*, 400 U.S. 517, 535, 91 S. Ct. 534, 544 (1971). Judge Brown's stated position in his opinions below is that Congress' enactment of a "stringent code of confidentiality" in the Tax Reform Act of 1976 constitutes such "unambiguous directions from Congress," which expressly provide that "I.R.S. investigative powers do not include the power for unnecessary in-

vasions of privacy or injuries of a taxpayer's reputation." *Barrett II*, 804 F.2d at 1381; Appendix A-54, *infra*; *Barrett III*, 837 F.2d at 1357; Appendix A-40, *infra*. Throughout the legislative history of section 6103 referenced in Judge Brown's dissent, it is apparent Congress intended "return information" to be entitled to the constitutional guarantee of privacy, including the right to privacy in the fourth amendment, e.g., ". . . the committee decided that the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service was entitled to essentially *the same degree of privacy as those private papers maintained in his home.*" *Barrett III*, 837 F.2d at 1355, footnote 17; Appendix A-33-34, *infra* (emphasis in the original). Certainly, the high degree of privacy protection Congress intended for "return information" would cover the I.R.S.'s use of a taxpayer's records to mass circularize disclosures to all of his customers that he is under an administrative criminal investigation. Notwithstanding the express wording of the confidentiality statutes of the Tax Reform Act of 1976, including sections 6103(b)(2)(A) and 6103 (k)(6), and their extensive legislative history, the Fifth Circuit's majority opinion refused to acknowledge that such statutes constitute the appropriate type of "unambiguous directions from Congress" that would allow a district court to conditionally enforce a summons to uphold such directions. *Barrett III*, 837 F.2d at 1348-50; Appendix A-19-22, *infra*. Instead, the majority opinion interprets this Court's requirement of "unambiguous directions from Congress" as requiring, in effect, a specific *procedural* statute precisely directing a district court to protect section 6103 confidentiality rights of taxpayers in summons proceedings. *Id.* To the contrary, and as only one of many

examples, in *United States v. Euge,* Mr. Justice Rehnquist stated on this point that summons authority:

> should be upheld absent express statutory prohibition or substantial countervailing policies. The authority claimed here is necessary for the effective exercise of the Service's enforcement and responsibilities; *it is entirely consistent with the statutory language; and it is not in derogation of any constitutional rights or countervailing policies enunciated by Congress.*

444 U.S. 707, 711, 100 S. Ct. 874, 878 (1980) (emphasis added). It is clear that this Court in *Euge, Arthur Young & Company, Bisceglia,* and *Donaldson* searched for whether the enforcement of the summonses would be inconsistent with any *substantive* constitutional rights or *substantive* statutory rights enunciated by Congress. This Court's recent decision in *Church of Scientology v. I.R.S.*, ____U.S.____, 108 S. Ct. 271 (1987), holding that section 6103 takes precedence over the Freedom of Information Act, certainly supports Judge Brown's position that the I.R.S. has no power to disclose "return information" except under strictly limited circumstances and that section 6103 is the appropriate type of "unambiguous direction from Congress" contemplated by this Court. The District of Columbia Circuit has also recognized Congress' limitation in section 6103 on the power of the I.R.S. by holding that taxpayers had standing under section 6103 to obtain a declaratory judgment preventing future violations of section 6103. *Tierney v. Schweiker,* 718 F.2d 449, 452-54 (D.C. Cir. 1983). The Fifth Circuit's majority opinion, therefore, too narrowly construes this Court's requirement of "unambiguous directions from Congress" as requiring a specific procedural statute precisely directing a district court to protect rights under section 6103 in a

summons proceeding. Further in this regard, the Fifth Circuit's decision totally ignores the direction from Congress in section 7402(a) that district courts do have jurisdictional authority to issue such "judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws," as was recognized by the Ninth Circuit in *Author Services,* 804 F.2d at 1525.

The Fifth Circuit's reasoning for its narrow construction of this Court's prior decisions requiring "unambiguous directions from Congress" is that allowing conditional enforcement would "burden the 'summary' nature of summons enforcement proceedings" and that the civil damage remedy of section 7431 and the felony provision of section 7213 were intended to be sufficient to deter unnecessary disclosures of confidential return information. *Barrett III,* 837 F.2d at 1349-50; Appendix A-19-21, *infra.* Such reasoning, however, ignores this Court's often stated principle of constitutional law that a subsequent post-deprivation damage action does not provide adequate due process of law. *Fuentes v. Shevin,* 407 U.S. 67, 82, 92 S. Ct. 1983, 1995 (1972) (" 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone,' " quoting *Stanley v. Illinois,* 405 U.S. 645, 647, 92 S. Ct. 1208, 1210 (1972)). The Fifth Circuit's reliance on the existence of the felony provision of section 7213 as a reason for concluding the district court is without jurisdiction in this matter is also misplaced; such section means it is "unlawful" for I.R.S. employees to make unauthorized disclosures of return information, as expressly stated in section 7213(a)(1). This unwarranted reliance by the Fifth Circuit underscores the effect of its ruling as being that the I.R.S. may conduct

its investigation by illegal means and a federal district court has no power to prevent such unlawfulness even while the parties are before the court.

This Court's comment in *Donaldson* regarding the "summary" nature of a summons enforcement proceeding was in the context of denying a taxpayer a mandatory right to intervene in a summons proceeding for records in which the taxpayer could show no significant interest or privilege. *Donaldson*, 400 U.S. at 529-30, 91 S. Ct. at 541-42. Contrary to the Fifth Circuit's reasoning below, this Court in *Donaldson* held that the permissive intervention rules of the Federal Rules of Civil Procedure noted in *Powell* were "not intended to impair a *summary* enforcement proceeding *so long as the rights of the party summoned are protected* and an adversary hearing, if requested, is made available." *Id.* at 529, 91 S. Ct. at 541 (emphasis added). Therefore, regardless of the summary nature of a summons enforcement proceeding, according to *Donaldson*, it is supposed to afford taxpayers whose records are summoned due process protection of their substantive rights with regard to the government's use of such records.

Because it is clear the Fifth Circuit's decision below has diminished the power of district courts to prevent abuse of their process and to protect taxpayers' rights in summons enforcement proceedings as intended by this Court in *Powell* and *Reisman* and because it misapplies this Court's decision in *Arthur Young & Co.*, et al, this Court should grant certiorari to review this matter even if no direct conflict existed with the Ninth Circuit as hereinafter described.

II.

The Fifth Circuit's Decision is in Direct Conflict With Two Ninth Circuit Cases Which Uphold the Jurisdictional Authority of Federal District Courts to Conditionally Enforce I.R.S. Summonses.

The Fifth Circuit decision below is in direct conflict with *United States v. Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986), *reh'g denied* (unpublished) Nos. 85-6194, 85-6195 (9th Cir. Feb. 26, 1987), *modified* 811 F.2d 1264 (9th Cir. 1987), and *United States v. Zolin*, 809 F.2d 1411 (9th Cir.), *reh'g en banc granted* 832 F.2d 127 (9th Cir. 1987), *order granting reh'g en banc vacated*, Nos. 85-6065, 85-6105, *slip op.* at 3647 (9th Cir. March 28, 1988). Both Ninth Circuit cases specifically hold that district courts do have the authority to conditionally enforce a summons to prevent I.R.S. violations of section 6103. In *Author Services*, the Ninth Circuit specifically cited this Court's decision in *Powell* that a district court has "the authority and obligation to prevent future abuses of its process" as support for its conditional enforcement of a summons to protect the section 6103 rights involved therein. *Author Services*, 804 F.2d at 1525. Furthermore, the Ninth Circuit reasoned and stated that "[t]he terms of an enforcement order rest within the discretion of the district court, *United States v. Vetco, Inc.*, 691 F.2d 1281, 1291 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S. Ct. 671, 70 L.Ed.2d 639 (1981), and its discretion is 'considerable.' *United States v. Ruggeiro*, 425 F.2d 1069, 1071 (9th Cir. 1970), *cert. denied*, 401 U.S. 922, 91 S. Ct. 863, 27 L.Ed.2d 826 (1971)." *Id.* The Ninth Circuit also cited the statutory authority it relied upon and reasoned that "district courts have broad authority, under 26 U.S.C.

§ 7402(a) (1982), to issue any orders or decrees as may be necessary or appropriate for enforcement of the internal revenue laws." *Id.* Additionally, the Ninth Circuit cited Fifth Circuit Judge John R. Brown's dissenting opinion in *Barrett I* and agreed with Judge Brown that the *Texas Heart* rule allowing conditional enforcement was "sound."[3] *Id.* Finally, the Ninth Circuit reasoned that the district court's restriction on the enforcement order was "a wise exercise of control, serving the interests of judicial economy in a case in which continuing litigation between the Church and the Government is inevitable." *Author Services,* 804 F.2d at 1526.

Notwithstanding the above reasoning of the Ninth Circuit, footnote 11 of the Fifth Circuit majority opinion erroneously states that the Ninth Circuit in *Author Services* simply relied on the prior decision in *Texas Heart* and "[n]o further reasoning was provided." *Barrett III,* 837 F.2d at 1351 fn 11; Appendix A-25, *infra.* Contrary to such discounting by the Fifth Circuit of the holding in *Author Services,* the Ninth Circuit in *Author Services* clearly weighed the conflicting arguments and made an independent decision in favor of the existence of jurisdictional power in district courts to conditionally enforce I.R.S. summonses. The Fifth Circuit's majority opinion below totally failed to address the statutory provision relied on by the Ninth Circuit, section 7402(a) of the Internal Revenue Code, which is entitled "Jurisdiction of District Courts" and grants district courts the power "to issue *any* orders or decrees as may be necessary or appropriate for

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3. On March 3, 1987, the Ninth Circuit modified its decision in *Author Services* to replace its cite to *Barrett I* with the citation to *Barrett II* and again stated "We believe the *Texas Heart* rule to be sound and applicable to the facts of this case." *Author Services,* 811 F.2d at 1264.

enforcement of the internal revenue laws" (emphasis added). The Ninth Circuit obviously recognized that the confidentiality rights of taxpayers under section 6103 of the Internal Revenue Code is as much a part of the "internal revenue laws" as the Code provisions granting affirmative administrative powers to the I.R.S. The Fifth Circuit's majority opinion, however, held that "[t]here is no statutory authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons." *Barrett III*, 837 F.2d at 1350; Appendix A-22, *infra*. The Fifth Circuit's express holding that there is no statutory nor Supreme Court authority granting jurisdiction to district courts for conditional enforcement, and its failure to even address the Ninth Circuit's citation in *Author Services* of both section 7402 (a) and *Powell* as constituting such authority, underscores the irreconcilable conflict between the two circuits, further justifying the exercise of this Court's discretional jurisdiction to resolve such conflict.

In *Zolin*, the Ninth Circuit again independently addressed the district court's restriction on the I.R.S.'s disclosure of the documents summoned and held that it was "an appropriate exercise of the district court's discretion: It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. *Powell*, 379 U.S. at 58, 85 S. Ct. at 255." *Zolin*, 809 F.2d at 1416-1417. The Ninth Circuit then specifically held, contrary to the Fifth Circuit below, that "[a] district court may, when appropriate, condition enforcement of a summons on the I.R.S.'s agreeing to abide by disclosure restrictions," citing *Author Services* and *Texas Heart*. *Id.* at 1417. On March 28, 1988,

the Ninth Circuit ruled that its prior order granting en banc review should be vacated as improvidently granted. *Zolin*, slip op. at 3647 (9th Cir. March 28, 1988). As a result, the Ninth Circuit has let stand its rulings in *Zolin* and *Author Services* that district courts do have the power to conditionally enforce I.R.S. summonses to protect section 6103 rights.

To allow the above-described conflict between the Fifth and Ninth Circuits to go unresolved will allow federal taxpayers in the Ninth Circuit to be entitled to a predisclosure (i.e., predeprivation) remedy regarding their confidentiality rights over information procured by a summons, while federal taxpayers in the Fifth Circuit are relegated to an action for damages after the fact. Such a degree of inconsistency in the application of the particular internal revenue laws involved and the inconsistency in the exercise of federal court jurisdiction over such application presents a substantially important need for this Court's resolution of the conflict.

III.

The Fifth Circuit's Decision Thwarts the Broad Concern and Determination By Congress That Confidential "Return Information" Not Be Disclosed Except Under Strictly Limited Circumstances.

The pertinent provisions of the Tax Reform Act of 1976 and the underlying legislative history demonstrating the breadth of congressional concern to prevent abuse of privacy rights of taxpayers are fully presented by Fifth Circuit Judge John R. Brown in his dissent below. 837 F.2d at 1351-1358; Appendix A-26-40, *infra*. It does not appear necessary, therefore, to repeat in this petition the detail of what Judge Brown has so eloquently presented. Judge Brown is correct that the Fifth Circuit's decision

thwarts the concern and direction of Congress that "return information" not be disclosed except under the strictly limited circumstances listed in section 6103.

It is emphasized that the Fifth Circuit's decision, in effect, takes the position that even if the I.R.S.'s proposed disclosures would constitute felony criminal acts under section 7213 and would subject the public treasury to any degree of damages under section 7431, federal district courts still have no power to prevent such crimes nor protect the government's treasury from being depleted. The amount of minimum liquidated damages under secton 7431 of $1,000 per disclosure alone can result in substantial damages. For example, Agent Hanson mailed at least three-hundred fifty (350) separate letters to Dr. Barrett's patients thereby exposing the public treasury to a minimum of $350,000.00 in damages and he proposes to mail more letters. The public importance of this case is, therefore, further demonstrated by the unwise willingness of the Fifth Circuit's majority opinion to allow the public treasury to be unnecessarily depleted when federal district courts could protect the treasury by merely preventing "an abuse of their process" and protecting the taxpayer's substantive rights under section 6103. Furthermore, as Judge Brown urged in *Barrett II*, 804 F.2d at 1381; Appendix A-55, *infra*, and as the Ninth Circuit noted in *Author Services*, 804 F.2d at 1526, the interests of judicial resources and economy are better served by allowing the district court to make a conditional enforcement order rather than generating entirely separate lawsuits for damages after the fact. Congress did not intend the public treasury and the resources of district courts to be unnecessarily depleted when it could be prevented by a district court entering an order appropriately enforcing the internal revenue laws, including section 6103.

CONCLUSION

For the reasons stated above, petitioner respectfully prays that this petition be granted and that the Fifth Circuit's decision be reversed.

Respectfully submitted,

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April 15, 1988

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APPENDIX

UNITED STATES of America and Michael O. Hanson, Special Agent of the Internal Revenue Service, Plaintiffs-Appellees,

v.

Bernard M. BARRETT, Jr., as President of Plastic and Reconstructive Surgeons, P.A., Houston, Texas, Defendant-Appellant.

No. 85-2054.

United States Court of Appeals, Fifth Circuit.

Feb. 24, 1988.

United States brought action to enforce Internal Revenue Service summons. The United States District Court for the Southern District of Texas, James DeAnda, J., entered enforcement order, and taxpayer appealed. The Court of Appeals, 804 F.2d 1376, affirmed and remanded. On rehearing, the Court of Appeals held that: (1) issue of whether district court could conditionally enforce IRS summons order so as to prevent violations of disclosure section of code was not moot, and (2) district court could not conditionally enforce order.

Summons order affirmed.

John R. Brown, Circuit Judge, filed opinion concurring in part and dissenting in part in which Politz, Johnson and Jerre S. Williams, Circuit Judges, joined.

Alvin B. Rubin, Circuit Judge, filed a dissenting opinion in which E. Grady Jolly, Circuit Judge, joined.

Edward D. Urquhart, Charles J. [Escher], Silvia T. Hassel, Urquhart & Hassell, Houston, Tex., for defendant-appellant.

Henry K. Oncken, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., William A. Whitledge, Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Div., Michael L. Paup, Chief, U.S. Dept. of Justice, Charles E. Brookhart, Washington, D.C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, CAROLYN DINEEN KING,* JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, and JONES, Circuit Judges.**

PER CURIAM:

The question presented in this appeal is whether a district court can conditionally enforce an Internal Revenue Service (IRS) summons to ensure that the IRS will not violate the nondisclosure of return information provisions contained in 26 U.S.C. § 6103 while it conducts a tax investigation. We answer this question in the negative.

I.

The facts giving rise to the present controversy, as set forth in the panel opinion on rehearing in *United States*

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* Formerly Carolyn Dineen Randall.

** Due to his deah on October 19, 1987, Judge Hill did not participate in this decision.

Judge Jerry E. Smith was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

v. Barrett, 804 F.2d 1376 (5th Cir. 1986) (*Barrett II*), are as follows:

> [Dr. Bernard M. Barrett, Jr.] is the president of an incorporated medical practice specializing in plastic and reconstructive surgery. In 1979 the IRS began an audit of Barrett's personal and corporate income tax returns for the years 1976, 1977, and 1978. When the initial investigation uncovered a $100,000 discrepancy between Barrett's books and his bank records, the IRS transferred the case from its civil to its criminal division.
>
> Agent Michael O. Hanson, to whom the case was transferred, determined that it would be necessary to inquire of Barrett's patients the amount each had payed for Barrett's services. To this end, Agent Hanson sent two sets of summonses calling for patient's records, one to the hospitals where Barrett practiced and one to Barrett himself. All but four of the hospitals complied with the summonses providing a total of 350 patients' names. [Barrett has also complied with the summons.] Agent Hanson then sent a letter to each patient advising that Barrett was being investigated by the Criminal Investigation Division of the IRS and requesting documentation of fees paid to Barrett.

Barrett II, 804 F.2d at 1377.[1]

In *United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985), the district court refused to enforce the summonses issued to the hospitals. A panel of this court reversed that decision and remanded the case to

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1. The panel opinions in this case [*United States v. Barrett,* 787 F.2d 958 (5th Cir. 1986) and *United States v. Barrett,* 804 F.2d 1376 (5th Cir. 1986)] were vacated by the court's action granting rehearing en banc without express provision, 812 F.2d 936. *See* Internal Operating Procedures following Local Rule 35.

the district court for a determination of whether the mailing of the letters to Barrett's patients would be a violation of 26 U.S.C. § 6103, and, if so, whether enforcement should be conditioned upon requiring the IRS to desist from further unlawful disclosures. 755 F.2d at 482.

In the initial panel opinion in this case, *United States v. Barrett*, 787 F.2d 958 (5th Cir. 1986) (*Barrett I*), this court upheld the district court's decision to enforce unconditionally the summons issued to Dr. Barrett. The court also limited the scope of *Texas Heart*, refusing to hold that a violation of section 6103 was grounds to deny enforcement of, or to conditionally enforce, the summons. Judge Brown dissented, arguing that the court had implicitly overruled *Texas Heart*. Dr. Barrett subsequently filed a petition for rehearing. The court responded by withdrawing its earlier opinion, affirming the enforcement of the summons, but also remanding the case to the district court for it to follow *Texas Heart* and inquire whether section 6103 was being violated; if so, then the court was to conditionally enforce the summons to prevent the IRS from making disclosures in violation of section 6103. The government petitioned for a rehearing of that decision. This court granted the request, agreeing to rehear the case en banc.

In this appeal the government contends that the holding in *Texas Heart* that a district court has the authority to enter conditional summons enforcement orders to prevent a violation of section 6103 should be overruled. The government also contends that the district court's order unconditionally enforcing the summons in this case is correct and should be affirmed. Barrett responds that district courts hearing an IRS summons enforcement pro-

ceeding have long been held to have the power to modify a summons to prevent a violation of law by IRS officials or to protect the rights of a taxpayer. Thus, it is argued that district courts should be allowed to consider section 6103 in deciding whether to conditionally enforce the summons.[2] Therefore, we must examine the validity of the rule established in *Texas Heart* that in a summons enforcement proceeding a district court can consider whether a section 6103 violation may occur, and, if it does so find, determine whether to conditionally enforce the summons. The first issue we must address is whether the case before us is moot. Before we examine that issue, however, we briefly discuss the relevant background necessary to decide the mootness issue.

II.

This case involves the construction of a number of Internal Revenue Code (the Code) provisions. First, section 6103(a)[3] establishes a general rule that tax returns

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2. Barrett also argues that the fifth amendment Due Process Clause requires that a predisclosure remedy needs to be provided in this case. This issue, however, is being raised for the first time on appeal, and this court will only consider an issue raised for the first time on appeal if the issue is purely a legal issue and if consideration is necessary to avoid a miscarriage of justice. *In re Goff*, 812 F.2d 931, 933 (5th Cir. 1987). "We will not allow a party to raise an issue for the first time on appeal merely because the party thinks that he or she might prevail if given the opportunity to try the case again on a different theory." *Id.* While this may be purely a legal issue, we do not believe a miscarriage of justice will result in this case from our declining to address it. Although there is some evidence that the government may contact Barrett's patients, and that if it does, that it may do so in a way that will violate section 6103; it may also be the case that the government will not contact them. Moreover, even if there is a violation, Barrett has an adequate remedy at law under 26 U.S.C. § 7213 where he can sue for damages.

3. All references in the text are to sections of the Code under 26 U.S.C.

and tax return information are confidential and may not be disclosed by officers and employees of the United States.[4] If a government official violates the nondisclosure provisions of section 6103(a), he is subject to criminal prosecution under section 7213(a)(1). This section makes it unlawful to disclose any return or return information except as authorized by the Code. A willful violation is punishable by a fine up to $5,000, or imprisonment of up to a period of 5 years, or both. 26 U.S.C. § 7213(a)(1). Moreover, if return information is impermissibly disclosed, section 7431 provides the aggrieved person with a civil remedy. The person can bring a cause of action against the United States, and can recover damages of a minimum amount of $1,000 for each unauthorized disclosure. *Id.* § 7431(c).

The other relevant provisions of the Code are those relating to the IRS's power to seek information relevant to a tax investigation. The IRS is authorized by section 7602(a) to issue a summons to compel any person having possession of books of account, papers, or other data to produce such materials when needed by the IRS to determine the correctness of a tax return or otherwise to determine the tax liability of an individual. If the

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4. The government concedes that the proposed mailings to Barrett's patients contain "return information" as defined in 26 U.S.C. § 6103(b)(2). There are various exceptions, however, to this general rule of nondisclosure of return information. *See* 26 U.S.C. § 6103 (c)-(*o*). One such exception, for example, allows an IRS officer or employee to "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available." 26 U.S.C. § 6103(k)(6). Whether the return information in this case comes within the section 6103(k)(6) exception is not at issue here. Rather, that inquiry is one that the district court would be required to make under *Texas Heart* in determining whether to conditionally enforce the summons. *See Texas Heart,* 755 F.2d at 482.

person does not comply with the summons, the IRS can file a petition for enforcement with the district court. 26 U.S.C. § 7604.

[1] In *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964), the Supreme Court set forth four criteria that the IRS must establish in order to have a summons enforced:

> (1) The IRS agent must show that the investigation will be conducted pursuant to a legitimate purpose;
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> (2) that the inquiry may be relevant to the purpose;
>
> (3) that the information sought is not already within the IRS's possession; and
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> (4) that the administrative steps required by the Code have been followed.

Powell, 379 U.S. at 57-58, 85 S. Ct. at 255. The Court also instructed that a court could inquire into the underlying reasons for the examination and that it should not permit its process to be abused. *Id.* at 58, 85 S. Ct. at 255. "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.*

The government bears the intial burden of proving that the four *Powell* requirements have been satisfied. *Texas Heart,* 755 F.2d at 474. Once the government makes the required *Powell* showing, the burden then shifts to the party resisting the summons to challenge the summons on any appropriate ground. *Powell,* 379 U.S. at 58, 85 S. Ct. at 255 (quoting *Reisman v. Caplin,* 375 U.S. 440,

449, 84 S. Ct. 508, 513, 11 L.Ed.2d 459 (1964)). These grounds include that the IRS has failed to meet one of the four *Powell* requirements, or that the enforcement of the summons would abuse the court's process.

III.

Before we reach the merits in this appeal, we must address the preliminary issue of whether the case before us is moot. Although neither party has raised the mootness issue, this court is required to do so *sua sponte*, because this issue implicates the article III requirement that there be a live case or controversy.[5] *Donovan v. Air Transport District Lodge No. 146*, 754 F.2d 621, 624 (5th Cir. 1985). The mootness concern is based upon the fact that Dr. Barrett ultimately complied with the summons after he was unable to obtain a stay of the district court's summons enforcement order. This court has often held that an appeal from an order enforcing a summons becomes moot once the taxpayer complies with the summons. *See United States v. Sherlock*, 756 F.2d 1145, 1146 (5th Cir. 1985); *United States v. Sweet*, 655 F.2d 54, 55 (5th Cir. 1981); *United States v. First American Bank*, 649 F.2d 288, 289 (5th Cir. 1981); *United States v. First State Bank of Clute*, 626 F.2d 1227, 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 908, 101 S. Ct. 3037, 69 L.Ed.2d 410 (1981); *United States v. Carpenter*, 425 F.2d 264, 264-65 (5th Cir. 1970); *Baldridge v. United States*, 406 F.2d 526, 527 (5th Cir. 1969); *Grathwohl v. United States*, 401 F.2d 166, 167 (5th Cir. 1968); *Lawhon v. United States*, 390 F.2d 663, 663 (5th Cir. 1968).

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5. Having done so, we requested the parties to supplement their briefs by addressing the mootness issue, which they have done.

Thus, in *Sherlock* we held that since Sherlock complied with the summons, his appeal was moot. Sherlock's argument that the government continued to benefit from the material did not persuade the court otherwise. 756 F.2d at 1146. In *First American Bank* this court also held that compliance with a summary enforcement order mooted an appeal from that order. The appellants argued that the issues were not moot because, if their contentions that the district court erred in determining that the summonses had a valid civil investigative purpose and that the IRS agent violated the automatic stay provision of Fed. R. Civ. P. 62(a) were correct, the IRS could not use the documents so obtained in any future civil or criminal proceeding. The court disagreed, stating that, "The possibility that evidence must be suppressed in a future proceeding, however, is not enough to prevent mootness in this case." 649 F.2d at 289. In *Carpenter* this court, without elaboration, held that the appeal of a summons enforcement order that had been complied with was moot. 425 F.2d at 265. Likewise, in *Baldridge* the appellants had complied with the summons, so the court held the case to be moot. The court also disagreed that a question of substantial public interest should allow the case to prevent its mootness, or again that the court should hear the appeal to determine whether the records would be admissible in a subsequent criminal or civil trial. 406 F.2d at 527. In *Grathwohl* this court stated that since the appellant had appeared and complied with the summons, there was no relief that she could obtain on appeal and the case was moot. 401 F.2d at 167. Finally, in *Lawhon* we held that there were no issues to decide because the records and books that were the subject of the order to produce had been produced. Thus, the court dismissed the appeal for mootness. 390 F.2d

at 663. On motion for reconsideration, the court stated, in what has become an often quoted passage:

> This motion, in effect, seeks to have this court give an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial. Such event may not occur. This court passes no judgment on the question whether, if the mooted records are used in a subsequent prosecution of the taxpayers, if there be one, their introduction would be forbidden as violating the constitutional rights of the defendants.

Id. at 663.

Although none of the above authority provide much analysis, apparently the common denominator in each is that once an individual complies with a summons enforcement order, that person is precluded from appealing any issues that attack the validity of the district court's decision to enforce the summons. Even an attack on the enforcement of a summons based on the fact that information obtained by the summons may be used improperly in a subsequent civil or criminal proceeding is not enough to prevent the case from being moot.

Many other circuits have also held that compliance with an IRS summons moots an appeal of the validity of the summons enforcement order.[6] The basis for these

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6. First Circuit: *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021, 101 S. Ct. 588, 66 L.Ed.2d 483 (1980); *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971). Second Circuit: *United States v. Deak-Perera Intern. Banking Corp.*, 610 F.2d 89 (2d Cir. 1979). Third Circuit: *Vesco v. SEC*, 462 F.2d 1350 (3d Cir. 1972) (analogous SEC subpoena case). Fourth Circuit: *Kurshan v. Riley*, 484 F.2d 952 (4th Cir. 1973). Sixth Circuit: *United States v. Patmon*, 630 F.2d 458 (6th Cir. 1980). Seventh Circuit: *United States v. Kis*, 658 F.2d 526, 532-33 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018, 102 S. Ct. 1712,

decisions, whether implicit or explicit, is the proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in [the] case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L.Ed.2d 413 (1971). Thus, once an individual complies with a summons enforcement order and produces the documents, a successful challenge to the enforcement order could afford no relief; the information has already been provided and thus this court would be powerless to provide relief that would affect the rights of the litigants.

Based on this precedent, the government contends that since the IRS has been supplied with all the information it sought pursuant to the summons, the case should be dismissed as moot. In determining whether this controversy is moot, it is necessary to keep in mind the single issue that has been presented to the court: whether a district court can conditionally enforce a summons in order to prevent the government from violating section 6103.

[2] To decide whether this issue can survive a mootness challenge, it is helpful to first examine both the holding in *Texas Heart* that forms the basis of the government's contention and our opinion in *Barrett II*. In *Texas Heart* this court was faced with the issue of whether the district court correctly declined to enforce summonses

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72 L.Ed.2d 135 (1982). Eighth Circuit: *United States v. Orlowski*, 808 F.2d 1283, 1287 (8th Cir. 1986); *United States v. Olson*, 604 F.2d 29, 31 (8th Cir. 1979); *United States v. First National Bank of Sturgis, S.D.*, 587 F.2d 909, 910 (8th Cir. 1978); *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978); Ninth Circuit: *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979) (analogous SEC subpoena case). *But see Gluck v. United States*, 771 F.2d 750, 753-54 (3d Cir. 1985).

issued to four hospitals. We reviewed the issue under the four part test established in *Powell*. The portions of *Texas Heart* revelant to this appeal are the court's analysis of the "legitimate purpose" prong of the *Powell* test and the "abuse of process" inquiry that a court should also make.

The court in *Texas Heart* found that the IRS did have a legitimate purpose, 755 F.2d at 479, but then addressed Dr. Barrett's contentions that the IRS lacked a legitimate purpose because of alleged violations of section 6103. *Id.* The court pointed out that an improper disclosure of section 6103 information was relevant only to the extent that it would demonstrate either an abuse of process or a lack of legitimate purpose, *id.*, but concluded that if there were any improper disclosures, they did not demonstrate either bad faith or an improper purpose. *Id.* The court went on to note, however, that:

> This Court does not hold that unlawful disclosures of returns or return information by the IRS can *never* be sufiicient evidence of lack of a legitimate purpose for the investigation such that IRS summonses should not be enforced. Rather, this Court holds that in *this* case, even accepting as true that improper disclosures occurred, any alleged improper disclosures do not rise to the level necessary to demonstrate bad faith in the issuance of the summonses or lack of a legitimate purpose for the investigation.

Id. at 481 (emphasis in original). Even though the improper disclosures did not reflect a sufficient degree of bad faith or lack of legitimate purpose to deny enforcement of the summons in their entirety, the court held that the district court nevertheless could require the IRS

to abide by section 6103 before it would order enforcement of the summonses. *Id.*

Thus, this language allows a summoned individual to raise the issue of a section 6103 violation to attempt to defeat the enforcement of the summons. If a violation does not rise to a sufficient level to defeat the enforcement of the summons, though, it nevertheless can still cause the enforcement of the summons to be conditioned. This remedy forms part of the basis of the government's contention that *Texas Heart* incorrectly estabilshed that a district court can conditionally enforce a summons.

The government's objection to *Texas Heart* is also based on the court's discussion dealing with the abuse of process inquiry a court must make. While the court found no abuse of process to such a degree that it would be necessary to deny enforcement of the summons, the court did note that it still could be an abuse of process to allow enforcement of summonses when the IRS conceded that it would continue to disclose information in violation of section 6103. *Id.* at 482. The court did not point out in that discussion, however, whether a violation of section 6103 would be sufficient to completely deny enforcement of the summons. From the prior discussion relating to "legitimacy of purpose," however, it appears that enforcement could be completely denied if an abuse of process was established. *See id.* at 479, 481. Nevertheless, the court clearly held that if an abuse of process were found, the district court would have the discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further violations of section 6103. *Id.* at 482. The court in *Texas Heart* then established the inquiry the district court would be required

to make prior to conditioning the enforcement of the summons:

> (1) determine whether the described information falls under the definition of returns or return information in section 6103, and
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> (2) if so, the district court must further determine whether the IRS is authorized to disclose the information under section 6103(k)(6).

Id. at 482.

The court stated in *Barrett II* that in *Barrett I* it misgauged the scope of the holding in *Texas Heart*. *See Barrett II*, 804 F.2d at 1377. The concern, however, was not with whether the summons was properly enforced by the district court.[7] Rather, the single issue resolved by the opinion in *Barrett II* was whether a summons could be conditionally enforced:

> [W]e find that our mandate in *Texas Heart* requires the district court to consider whether enforcement of the IRS summons should be conditioned in order to protect Barrett against unnecessary disclosure of the fact that he is under criminal investigation. We affirm the order of the district court enforcing the IRS summons; we remand for the district court to determine whether the summons should be conditionally enforced.

Id. at 1379. In compliance with *Texas Heart*, the opinion in *Barrett II* decided to remand the case, not for the

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7. In fact, in *Barrett II* we expressly held that Dr. Barrett's claim that the district court improperly enforced the summons based upon an erroneous finding that the IRS possessed a legitimate investigatory purpose was moot because he complied with the summons. *Id.* at 1377-78.

purpose of having the district court delve into the propriety of enforcement, but instead to determine whether the district court should condition the enforcement of the summons to protect Dr. Barrett from a violation of section 6103. We have consistently treated the issues of (1) whether the enforcement order was properly rendered and (2) whether an enforcement order can be conditionally enforced as distinct issues on appeal.

With this same distinction in mind we now consider whether the issue in this appeal is moot. *Barrett II* would have remanded the case to the district court for it to determine whether the summons should be conditionally enforced based on *Texas Heart*. *See Barrett II*, 804 F.2d at 1379. Since Dr. Barrett has complied with the summons, Judge Rubin's dissent argues that the enforcement proceeding is over and we can consider no aspects of that proceeding, including whether *Texas Heart* requires that the summons should be conditionally enforced. However, we do not agree that such a result is mandated. We recognize that in *Texas Heart* the enforcement order had not been complied with by the four hospitals, and, in fact, the district court had refused to enforce the summonses, so the controversy was still alive in all respects. But, the court reversed the district court and ordered that the summonses be enforced. Even though the enforcement issue had been decided, the court still held that the district court retained the authority to determine whether section 6103 was being violated, and, if so, to condition enforcement to avoid the violation. Thus, that same issue that we held was alive and must be considered by the district court in *Texas Heart* is likewise the sole justiciable issue in the present case.

Moreover, the conditional enforcement issue does not attack the validity of the district court's order to enforce the summons. Thus cases such as *Sherlock* do not control here. Those cases prevent a party from appealing the validity of an enforcement order after the party had complied with the enforcement order by having furnished the IRS with the sought after material. The issue here does not address the validity of the enforcement order. Instead, it addresses whether the district court after a decision to enforce a summons can attach conditions on the government's use of the information obtained under the summons. The district court in *Barrett II* did not decide whether there was a violation of section 6103, and, if so, whether to condition enforcement of the summons on the government's compliance with that section. If we were to hold that *Texas Heart* was correct and the district court should have made such an inquiry, we could then provide relief to Dr. Barrett by remanding the case to the district court for such consideration. We point out that the IRS had not yet contacted Dr. Barrett's patients and section 6103 information has not yet been disclosed.[8] Thus, if we were to remand this cause to the district court, it could prevent the IRS from violating this section. This is the relief Dr. Barrett desires.

Accordingly, we conclude that the conditional enforcement issue presented in this appeal is not moot, and we, therefore, decide whether a district court can conditionally enforce a summons order so as to prevent violations of section 6103.[9]

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8. The government informed the court of this fact at oral argument.

9. We point out that the issue of whether a district court can consider whether a violation of section 6103 is an independent ground

IV.

[3, 4] We begin by noting two important considerations in summons enforcement proceedings. First, we point out that these proceedings are intended to be summary in nature. The sole purpose of the enforcement proceedings is to ensure that the IRS has issued the summons for a proper purpose and in good faith. *See Powell,* 379 U.S. at 57-58, 85 S. Ct. at 255. Also, this is only an investigative stage; no guilt or liability on the part of the taxpayer is established. The enforcement proceeding should be concluded expeditiously so that the actual investigation can be continued with the goal of reaching the final determination of whether there will be any civil or criminal liability for the taxpayer.

We also recognize that the Supreme Court has consistently declined to circumscribe the breadth of the summons authority that Congress intended to grant the IRS, " 'absent unambiguous directions from Congress.' " *United*

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to deny enforcement of a summons is not before this court. However, to contrast the situation that is before us in the present case, we point out that if it were before us this issue would be moot. This question relates to what factors a district court can consider in making its initial determination of whether to enforce a summons in its entirety. That is, for example, could the district court have completely denied enforcement of the summons in *Barrett* because the government was suggesting that it would violate section 6103? This court cannot, however, consider any factors relating to whether the district court's order enforcing the summons was proper once the taxpayer has complied with the summons. *Cf. Sherlock,* 756 F.2d at 1146. Since this contention is one that directly relates to the district court's decision of whether to enforce the summons in its entirety, we could not decide its propriety. As noted above in footnote 7, the opinion in *Barrett II* held that the issue of whether the district court properly ordered enforcement of the summons was moot based on the fact that Dr. Barrett complied with the summons. *See Barrett II,* 804 F.2d at 1377-78. Thus, we would have no jurisdiction to decide whether the district court should consider section 6103 in deciding whether to enforce a summons.

States v. Arthur Young & Co., 465 U.S. 805, 816, 104 S. Ct. 1495, 1502, 79 L.Ed.2d 826 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S. Ct. 915, 921, 43 L.Ed.2d 88 (1975)); *United States v. Euge*, 444 U.S. 707, 715, 100 S. Ct. 874, 880, 63 L.Ed.2d 141 (1980). For example, in *Powell* the Supreme Court refused to read into section 7605(b), which prohibits "unnecessary examination[s]," a requirement that enforcements of summonses be founded on probable cause. The Court reasoned that "[a]lthough a more stringent interpretation is possible . . . we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted. . . ." 379 U.S. at 53-54, 85 S. Ct. at 253, *quoted in Euge*, 444 U.S. at 715, 100 S. Ct. at 880.

Similarly, in *Donaldson v. United States*, 400 U.S. 517, 91 S. Ct. 534, 27 L.Ed.2d 580 (1971), the Court declined to limit the summons authority to cases where no criminal prosecution was contemplated. "Any other holding," said the Court, "would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.'" 400 U.S. at 533, 91 S. Ct. at 544. Again, in *Bisceglia* the Court, finding no discernible contrary purpose by Congress, upheld the IRS's authority under section 7602 to issue a "John Doe" summons to a bank to determine the identity of unknown individuals who might be liable for unpaid taxes. The Court again broadly construed the IRS's summonsing authority in *Euge* to permit it to compel the execution of handwriting samples. A contrary result, reasoned the Court, would "stultify enforcement of federal law." 444 U.S. at 715, 100 S. Ct. at 880 (quoting *Donaldson*, 400 U.S. at 536, 91 S. Ct. at 545). Finally, in

Arthur Young & Co., the Court declined to accord a privilege to an auditor's tax accrual workpapers. "We are unable," wrote the Court, "to discern the sort of unambiguous directions from Congress that would justify a judicially created work-product immunity for tax accrual workpapers summoned under § 7602." 465 U.S. at 816, 104 S. Ct. at 1502.

[5] Thus, the Court has refused to impose limitations upon the IRS's summons authority unless it found explicit Congressional directives to do so. We believe that this judicial constraint used to avoid limiting the IRS's summons authority applies equally in this case and a court should not conditionally enforce a summons. If a court were to do so, it would then potentially have to become involved in the proceeding again at a later date to ensure compliance with the conditions it imposed. There is no evidence of a Congressional intent to burden the "summary" nature of summons enforcement proceedings by allowing the district court to conditionally enforce a summons.

In fact, it appears that the intent of Congress was definitely not to burden the summary nature of the enforcement proceedings with such an inquiry. Rather than enact a statute authorizing the district court to conditionally enforce a summons to prevent the government from violating section 6103, Congress instead enacted civil remedies that allow an individual to bring suit against the United States and provided for criminal prosecution of the disclosing parties. These remedies clearly are intended to deter unnecessary disclosures of confidential information.

In a summons enforcement proceeding, the district court's only task is to determine whether the summons

should or should not be enforced. This inquiry is limited to ensuring that the government has complied with the four *Powell* criteria, and that its process is not being abused. *Powell,* 379 U.S. at 57-58, 85 S. Ct. at 255. There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the IRS.

Dr. Barrett contends, however, that numerous decisions of this circuit provide district courts with the authority to condition a summons to protect the rights of taxpayers. While some of this authority may, arguably, support this view, most of it clearly does not, and we decline to adopt his position. The case that appears to most directly support Dr. Barrett's contention is *Dunn v. Ross,* 356 F.2d 664 (5th Cir. 1966). In *Dunn,* the court held that a summons under section 7602 could require the production of records for years that were time-barred from investigation so long as the material from those years was relevant for the years that were under investigation that were not time-barred. *Id.* at 666. In support for his position that a summons should be conditionally enforced when necessary Dr. Barrett relies on the following language in *Dunn*:

> Our decision, therefore, should not be construed as a blanket endorsement of summonses under 7602

> requiring the production of a vast amount of books and papers, many of which might be totally irrelevant and the production of which would cause great hardship to the persons at whom such summonses are directed. The District Court has broad discretion in the protection of the taxpayer and of third parties against oppressive procedures by working out appropriate limitations on which records are subject to investigation and the best location for such inspection for all concerned.

Id. at 667 (citation omitted). One reading of the second sentence from this passage could support the view that a district court has discretion in deciding how or to what extent to enforce a summons, *i.e.,* conditional enforcement. However, another reading of this language is that the district court has broad discretion in protecting taxpayers only by determining whether the sought after information is relevant. The relevancy inquiry is one of the *Powell* inquiries, and it only pertains to whether the summons should be enforced in its entirety. To the extent that *Dunn* can be read otherwise, to endorse the district court's ability to conditionally enforce a summons, it is overruled.

Our decision in *Venn v. United States,* 400 F.2d 207 (5th Cir. 1968), is also cited by Dr. Barrett as support for his position. He argues that in *Venn* this court affirmed the conditional enforcement of a summons to prevent improper use of the summoned information. We do not read *Venn* so broadly. *Venn* dealt with the issue of whether an unrelated criminal prosecution of a third party would prevent enforcement of a summons, when the taxpayer had materials relating to that third party's tax liability. *Id.* at 209. The court held it would not. Additionally, there was an issue of whether all the ma-

terial sought was relevant to the taxpayer's investigation. *Id.* We concluded that the government had not made such a showing. Thus, the issue in *Venn* that Dr. Barrett attempts to rely on as support for his position is one that deals with the scope of the enforcement order, i.e., what amount of information would the government be provided. This inquiry is also in the nature of asking whether the material is relevant. The case did not address the issue presented before us of whether conditions would be imposed on the government's use of the information once it was received. *Venn,* therefore, does not support Dr. Barrett.

Another decision, *United States v. Roundtree,* 420 F.2d 845 (5th Cir. 1969), is also cited by Dr. Barrett as support for his position. He quotes the following language from the opinion which reads: "Furthermore, courts may limit the invasions of privacy through the individual scrutiny to which a summons is subject for its enforcement through the standards enumerated in *Powell* of legitimate purpose, proper proceedure, relevance, and refusal to allow abuse of the courts' process," *id.* at 851, as support for the conditional enforcement inquiry we ordered in *Barrett II.* We do not believe this language supports that conclusion. The issue in *Roundtree* was whether a summons should be enforced, and what procedures were available to the taxpayer to assist him in attacking the summons. The court was not faced with the issue of whether to conditionally enforce the summons. Moreover, the language quoted by Dr. Barrett does not address the conditional enforcement of the summons, but rather it relates to the enforcement of the summons in its entirety.[10]

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10. Dr. Barrett has also cited *S.E.C. v. ESM Government Securities, Inc.,* 645 F.2d 310 (5th Cir. 1981), *United States v. Wright*

In sum, we do not believe that the cases cited by Dr. Barrett give rise to a conclusion that a district court can conditionally enforce a summons.[11]

V.

We hold that in a summons enforcement proceeding the only issue that the district court can decide is whether to enforce the summons. The court cannot conditionally enforce that order. Therefore, we OVERRULE the holding in *Texas Heart* that a district court should determine whether section 6103 was violated, and, if so, to condition enforcement on compliance with that section. The issue presented today does not call for us to decide whether a court's enforcement order may impose conditions respecting the time, place, manner, form or circum-

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Motor Company, 536 F.2d 1090 (5th Cir. 1976), *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971), *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977), *Linn v. Chivatero*, 714 F.2d 1278 (5th Cir. 1983), *United States v. Wyatt*, 637 F.2d 293 (5th Cir. 1981), and *United States v. Davis*, 636 F.2d 1028 (5th Cir.), *cert. denied*, 454 U.S. 862, 102 S. Ct. 320, 70 L.Ed.2d 162 (1981), as support for the proposition that a district court can conditionally enforce a summons. We have reviewed these cases and do not agree that they mandate Dr. Barrett's position.

11. The Ninth Circuit has also confronted the issue of conditional enforcement. In *United States v. Author Service[s], Inc.*, 804 F.2d 1520 (9th Cir. 1986), the court relied on our decision in *Texas Heart*. No further reasoning was provided. *Id.* at 1525 ("Courts routinely modify summonses to protect taxpayers' interests. *See, e.g., Dunn v. Ross*, 356 F.2d 664, 667 (5th Cir. 1966). This power has been construed to give a court the authority to condition enforcement of a summons on an IRS agreement to cease improper disclosures. *Texas Heart Institute*, 755 F.2d at 481.") Recently, in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), the Ninth Circuit simply followed its prior decision in *Author Services*, based on *Texas Heart*. *Id.* at 1417 ("A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services*, 804 F.2d at 1525 (citing *United States v. Texas Heart Institute*, 755 F.2d 469, 481 (5th Cir. 1985))").

stances in which some or all of what is sought by the subpoena will be furnished, or possibly other conditions precedent to the government's receipt, pursuant to the subpoena, of what it seeks thereby. The summons order in *Barrett II* is AFFIRMED in its entirety.

JOHN R. BROWN, Circuit Judge, with whom POLITZ, JOHNSON, and WILLIAMS, join concurring in part and dissenting in part:

I.

Case is Very Much Alive It is Not Moot

I concur in the court's decision that the case is not moot. To the court's discussion in Part III, I would point out that the issue was specifically raised in the original answer of Dr. Barrett, in his motion for new trial, and in the motion for stay of execution of judgment. Likewise, the parties considered it a very hotly contested issue in their respective briefs leading to *Barrett I, United States v. Barrett,* 787 F.2d 958 (5th Cir. 1986); and later, *Barrett II, United States v. Barrett,* 804 F.2d 1376 (5th Cir. 1986).[1]

II.

The Court's Decision is Faulty

But I dissent vigorously to the Court's overruling of *Texas Heart* and the holding of the majority that the United States District Court in the exercise of its residual,

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1. As does the court, see its n. 9, I find it unnecessary to determine whether a violation of § 6103 is an independent ground to deny enforcement of summons. I therefore neither agree nor disagree with what is stated or intimated in n. 9.

equitable discretion, may not, and has no power to, condition enforcement of the summons to prevent the disclosure of return information by the IRS in utilizing the summons (or information procured by it).

This result both rejects the Supreme Court's emphasis in *Powell*[2] that in the application for enforcement of an IRS summons, "it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." 379 U.S. at 58, 85 S. Ct. at 255, 13 L.Ed.2d at 120. And, even worse, the majority opinion thwarts the congressional determination that tax return information is confidential and may not, except under strictly limited circumstances, be disclosed.

Enter the Tax Reform Act of 1976

We should not forget that the Tax Reform Act of 1976 brought about revolutionary changes, not the least of which was the positive declaration that returns and return information are confidential.[3] Likewise, the Act defines "return or return information" in the broadest way.[4]

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2. *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed. 2d 112 (1964).

3. As a general rule:
Returns and return information shall be confidential, and except as authorized by this title—(1) no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner or in connection with his service as such an officer or employee. . . .
26 U.S.C. § 6103(a).

4. (b) Definitions. For the purpose of this section—
(1) Return.—The term "return" means any tax or information return, declaration of estimated tax . . .
(2) Return Information.—The term "return information" means —

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits,

The term "disclosure" is equally broad, meaning "the making known to any person in any manner whatever a return or return information." § 6103(b)(8).

That Congress specifically had in mind disclosures in the course of investigation of taxpayer's liability, civil or criminal, is reflected by § 6103(k)(6):

> (6) *Disclosure by Internal Revenue officers and employees for investigative purposes.*—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information *to the extent that* such disclosure *is necessary* in obtaining information, which is *not otherwise reasonably available*, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosure shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

(Emphasis added)

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assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, *whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing,* or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any *tax, penalty, interest, fine, forfeiture, or other imposition, or offense,* and

(B) any part of any written determination or any background file documents relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

26 U.S.C. § 6103(b). (Emphasis added).

This was the clear congressional intent reflected by the Senate Report[5] and in the strictly limited disclosure provisions.[6]

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5. The Senate Report broadly defined the term return information:

> to include the following data pertaining to a taxpayer: his identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments and tax payments. It also includes any particular of any data, received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return filed by the taxpayer or with respect to the determination of the existence, or possible existence, of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or *offense* provided for under the code.

Senate Report No. 94-938 Tax Reform Act of 1976 (hereinafter cited as "S. Rep."), *reprinted in* Internal Revenue Cumulative Bulletin, 1976-3 (hereinafter cited as "Bulletin"). S. Rep. p. 318, U.S. Code Cong. & Admin. News 1976, pp. 2897, 3748, Bulletin, p. 356. (Emphasis added).

Of special importance are the words which immediately followed the above:

> Information as to whether a taxpayer's return was, is being, or will be examined or are subject to other investigation or processing is also to be considered return information.

S. Rep. p. 319, U.S. Code Cong. & Admin. News 1976, p. 3748, Bulletin, p. 357.

6. The intent to strictly limit disclosure is reflected by the Senate Report:

> IRS officials and employees would be permitted, *if no reasonable alternative exists*, to make limited disclosures of return information in connection with an audit or investigtion *to the extent necessary* in arriving at a correct determination of tax, liability for tax, or the amount to be collected, or otherwise in the enforcement of any provisions in the Code.

S. Rep. pp. 341-42, U.S. Code Cong. & Admin. News 1976, p. 377, Bulletin, pp. 379-80.

The report continues:

> In certain instances, it may be necessary for IRS personnel, in obtaining information with respect to a taxpayer from a third party, to disclose the fact that the request for information is in connection with an audit or other tax investigation of the taxpayer. In *rare and extraordinary cases*, it may also be neces-

Revealing Criminal Investigation a Disclosure of Return Information

Although *Texas Heart,* in calling for a remand, spoke in terms of whether the revelation in the prior patient mailings that Dr. Barrett was under criminal investigation was a disclosure of return information[7] and in our several concurring and dissenting opinions in *Barrett I* and *Barrett II,* we continued that approach, it is now clear beyond any question that this revelation was return information.[8]

The Breadth of Congressional Concern

Before trying to analyze whether the IRS and Agent Hanson have met either of the requirements of § 6103 that the disclosure be (i) authorized[9] and (ii) necessary "in obtaining information which is not otherwise reasonably available"[10] it is essential to see the apprehended widespread evils with which Congress was dealing. Initially, there is the recognition by Congress that this was

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sary for IRS personnel in obtaining information from a third party to disclose additional return information, such as the manner in which the taxpayer treated on his return a transaction with a third party. Disclosures under this provision are to be made *only* in situations and under conditions *specified in the regulations.* . . .

S. Rep. p. 342, U.S. Code Cong. & Admin. News 1976, p. 377, Bulletin, p. 380. (Emphasis added).

7. *See* Judge Hill's original majority opinion, *Barrett I,* 787 F.2d 958 at 960, n. 2 which states:

It is conceded by the government that the proposed mailings to Barrett's patients contain "return information."

8. *See,* e.g., my dissenting opinion *Barrett I,* 787 F.2d 958 at 963; and majority opinion *Barrett II,* 804 F.2d 1376 at 1378.

9. *See* n. 3, *supra.*

10. *See* § 6103(k)(6), *supra,* p. 6.

the first comprehensive review of the whole subject in over 40 years.[11]

Next, of importance, was the Congressional goal in reviewing the Internal Revenue Code (IRC) to give taxpayers greater and greater protection. Congress was aware ot the complaints of literally millions of taxpayers concerning abuses in the administration of the IRC.[12] One of the problems to be resolved was the fact that the IRS probably has more information about more people than any other agency in the country.[13] More than that,

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11. The Senate Report states:

> The statutory rules governing the disclosure of tax information have not been reviewed by the Congress for 40 years. Since that time a number of rules allowing disclosure of tax information to other government agencies have been established by executive order and regulation.

S. Rep. p. 317, U.S. Code Cong. & Admin. News 1976, p. 3746, Bulletin, p. 355.

12. "A fourth goal of the committee amendment is to improve the administration of the tax laws bureau to *strengthen* taxpayers' rights and to make tax collection more efficient. The amendment makes long overdue changes in these areas." (Emphasis supplied). S. Rep. p. 3, U.S. Code Cong. & Admin. News 1976, p. 3440, Bulletin, p. 59. *See also* S. Rep. p. 7, Bulletin, p. 63.

In the Summary of the Administrative Provisions, the report stated:

> 2. It provides definitive rules generally maintaining the confidentiality of tax returns. (Title IX).

S. Rep. p. 6, U.S. Code Cong. & Admin. News 1976, p. 3443, Bulletin, p. 62.

The Report further indicates:

> The most significant administrative provisions are those which strengthen taxpayers' rights.
>
> The committee amendment provides definitive rules relating to the confidentiality of tax returns, an area where there has been much abuse in the past. It strictly limits disclosure of information from tax returns.

S. Rep. p. 19, U.S. Code Cong. & Admin. News 1976, p. 3455, Bulletin, p. 75.

13. The Report further stated:

> It has been stated that the IRS probably has more information about more people than any other agency in this country. Con-

Congress expressed the specific intention to discontinue prior practices or regulations. Only those regulations specifically interpreting § 6103 have any validity.[14]

The extent to which Congress deliberately intended to constrict disclosure of these matters relating to the most intimate economic, financial and social facts concerning Americans—nearly all of whom are taxpayers—is crystalized by the Congressional restrictions imposed on others in the government who, statutorily at least, have had almost unlimited access to information through the disclosure of return information.

From the Top to the Bottom the President Being First

First, there were limitations on Presidential access to return information. Not only was the availability of such information carefully circumscribed, but the request for

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sequently, almost every other agency that has a need for information about U.S. citizens, therefore, logically seeks it from the IRS. However, in many cases the Congress has not specifically considered whether the agencies which have access to tax information should have that access.

S. Rep. pp. 316-17, U.S. Code Cong. & Admin. News 1976, p. 3746, Bulletin, pp. 354-55.

14. The Report further stated:

The committee amendment provides that as the general rule returns and return information are to be confidential and not subject to disclosure except as further provided in the section. Only those regulations now in effect and subsequently promulgated by the Secretary which interpret a specific provision of Section 6103 are to continue to have force and effect after the effective date of this amendment. Consequently, those regulations promulgated under Presidential authority prior to the effective date of the amendment which do not interpret any specific provision of this section are no longer to have any force and effect after the effective date of this amendment.

S. Rep. p. 318, U.S. Code Cong. & Admin. News 1976, p. 3749, Bulletin, p. 356.

disclosure called for a written request, *signed by the President personally*. Section 6103(g).[15] The President, with all of his other manifold duties, is also required to file an annual report with the Joint Committee on the Internal Revenue, showing in detail the persons involved and the reasons the President required return information. S.Rep., p. 323, Bulletin, p. 361. Likewise, there are severe restrictions on persons to whom the information may be delivered and how it may be used.

Likewise, stringent restrictions were placed on the disclosure of tax return infomation to the Department of Justice. *See* § 6103(h)(2).[16] With respect to non-tax civil or criminal cases, the Department of Justice must seek a court order. 26 U.S.C. § 6103(i)(1).[17]

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15. The Senate Report states:

> Under the committee amendment upon the written request of the President, signed by him personally, disclosure of return and return information is to be made to the President and/or to certain named employees of the White House Office.

S. Rep. p. 322, U.S. Code Cong. & Admin. News 1976, p. 3752, Bulletin, p. 360.

16. The Report further stated:

> The committee recognizes the need of the Justice Department to continued access to tax returns and return information in carrying out its statutory responsibility in the civil and criminal tax areas. While the committee decided to maintain the present rules pertaining to the disclosure of returns and return information of the taxpayer whose civil and criminal tax liability is at issue, restrictions were imposed in certain instances at the pretrial and trial levels with respect to the use of third party returns where, after comparing the minimal benefits derived from the standpoint of tax administration to the *potential abuse of privacy*, the committee concluded that the particular disclosure ***involved was unwarranted.***

S. Rep. pp. 324-25, U.S. Code Cong. & Admin. News 1976, p. 3754, Bulletin, pp. 362-3. (Emphasis added).

17. The Senate Report states:

> The committee decided that the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service was entitled to essentially the *same degree of*

All to be Reported to Congress

More than that, to assure public review of all discretionary disclosures, there is a stringent requirement, not only on the President, but on the IRS itself to report to Congress all applications for disclosure and actions taken. 26 U.S.C. § 6103(g).[18]

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privacy as those private papers maintained in his home. Present law and practice does not afford him that protection—the Justice Department and other Federal agencies, as a practical matter, being able to obtain that information for non tax purposes almost at their sole discretion.

The committee decided, therefore, that the Justice Department . . . should be required to obtain court approval for the inspection of a taxpayer's return or return information.

S. Rep., p. 328, U.S. Code Cong. & Admin. News 1976, pp. 3757, 3758, Bulletin, p. 366.

The committee decided that, although it is necessary to permit the disclosure of Federal returns and return information to other Federal and State agencies in certain situations for purposes other than the administration of the Federal tax laws, no such disclosure should be made unless the recipient agency complies with the comprehensive system of administrative, technical, and physical safeguards designed to protect the confidentiality of the returns and return information and to make certain that they are not used for purposes other than the purposes for which they were disclosed.

S. Rep., p. 344, U.S. Code Cong. & Admin. News 1976, p. 3774, Bulletin, p. 382.

18. The Report further stated:

Because the use of returns and return information for purposes other than tax administration has resulted in serious abuses of the rights of taxpayers in the past, and because the potential for abuse necessarily exists in any situation in which returns and return information are disclosed by the IRS to other Federal agencies and the States for purposes other than the administration of the Federal tax laws, the committee believes that it is necessary for Congress to review very closely the use of returns and return information and the extent to which taxpayer privacy is being protected. In order to permit that review, the committee decided to require that the IRS make certain comprehensive annual reports to the Joint Committee as to the use of returns and return information.

S. Rep., pp. 345-46, U.S. Code Cong. & Admin. News 1976, p. 3775, Bulletin, pp. 383-84.

Congress Increases Criminal and Civil Sanctions

And to all of these stringent requirements the Congress concluded that the current penalties ($1,000 fine, not exceeding one year in confinement) were too lenient. *See* S.Rep., p. 347, Bulletin, p. 385. "The committee decided that the present provisions designed to enforce the rules against the improper use or disclosure of returns and return information are inadequate. The committee decided that the criminal penalties for an [un]authorized[19] disclosure should be increased and that the situations to which they apply should be broadened to cover all situations in which returns and return information are treated as confidential." S.Rep., p. 347, U.S.Code Cong. & Admin. News 1976, p. 3777, Bulletin, p. 385.

The committee also decided to establish a civil remedy for any taxpayer damaged by an unlawful disclosure of returns or return information. The cause of action would extend to any disclosure of return or return information which is made in violation of section 6103. "[A person who willfully or negligently discloses] would be liable . . . for actual damages. . . . Punitive damages would also be authorized . . . [where disclosure is willful or a result of gross negligence]. . . . The amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure." S.Rep., p. 348, U.S. Code Cong. & Admin. News 1976, p. 3778, Bulletin, p. 386.

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19. From the context of the total quotation it is evident that *un*authorized disclosure was meant.

Disclosure of Criminal Investigation Not Necessary

With this stringent code of confidentiality, excused only by similarly stringent exemptions, we come then finally to whether the disclosure of criminal investigation was "necessary in obtaining information," which would "not otherwise [be] available." *See* section 6103(k)(6).

I would add to the cumulative literature of *Barrett I, II,* and *III,* only that to this day there has been no statement, either from on high in the Solicitor's office or the Department of Justice, or on the lower rungs of the IRS field agents, concerning why it was reasonably necessary to inform the patient interviewees that Dr. Barrett was under criminal investigation. All that the IRS could conceivably want from the inquiry was (i) the amount which the doctor charged the patient for the reconstructive plastic surgery, (iia) the amount that the patient paid, (iib) whether paid in cash or check, and (iii) the amount, if any, paid by an insurer. The fact that Dr. Barrett was facing criminal prosecution and punishment would have nothing to do with those inquiries. In any event, as the revelation was not necessary to obtain information there is no need to question whether the information was "not otherwise available." The requirements of § 6103(k)(6) were not met. The disclosure not being exempt, there was an explicit violation of § 6103's demand for confidentiality.

The Powell *Streamlined Procedure Not Imperiled*

The Court seems to fear that if judicial recognition is given to demand of the Tax Reform Act for confiden-

tiality and the stringent congressional prohibitions on unauthorized disclosure, the Internal Revenue Service will be thwarted in the effective enforcement of the IRS structure calling for billions and billions of voluntary, albeit with a little urging, taxpayer payments.

I cannot make too clear that I am not adding to the task of the district judge as he faces a § 7604(b) application for enforcement of an IRS summons. The District Court must still follow the standards of *Powell* and the numerous decisions that have followed it. The majority embraces these precedents, as do I.

With all of the writing that has gone on in this protracted case, I cannot improve on what I said in dissent in disposing of the then majority's holding in *Barrett I* that there was "no indication . . . that Congress intended Sections 6103 and 7431 to burden purportedly 'summary' enforcement proceedings with the time-consuming litigation that Section 6103(k)(6) determinations would entail." 787 F.2d at 961.

> One wonders, however, where the burden really lies and just how heavy or time-consuming it truly is. Unless acquiesced in, the IRS is already required to seek enforcement of its summonses in the District Court, where it must prove that is possesses a legitimate investigative purpose for the summons. Given that a hearing is already required to determine whether such a legitimate investigative purpose exists, it does not appear unreasonable to permit, or to require, a District Court to inquire at that proceeding into the breadth of the IRS summons, or the practices flowing from its use, can be tailored so as not to collide with a Congressional intent to protect the taxpayer against unnecessary invasions of his privacy. Much of the evidence pertinent to the

> existience of a legitimate investigative purpose for the summons will also be relevant to the determination of whether the disclosure of return information is necessary to obtain information that is otherwise not reasonably available. *See* 26 U.S.C. § 6103 (k)(6). The determination of whether there exists a legitimate investigative purpose for the summons is certainly not far removed from the determination of whether the practices flowing from its enforcement are an unnecessary invasion of privacy or threaten injury to a taxpayer's reputation.

Barrett I, 787 F.2d 958, 964. (Citations omitted).

Revelation Under Criminal Investigation is Damning

As I have stated before, the result of the Court's opinion, however, is that the District Court is required not only to enforce a summons without any statutory determination of necessity but to stand idly by while the IRS subjects a taxpayer to the ridicule and humiliation of being labeled as a criminal tax evader in the eyes of his fellows.

"This case presents a perfect illustration of the harm which will be wrought by adhering to [the Court's] result. Despite the instruction in the IRS Manual that 'caution must be exercised not [to] damage the reputation of the taxpayer by making [a mass mailing] either offensive or suggestive of any wrongdoing by the taxpayer.' 5 CCH, Internal Revenue Manual, ¶ 9781 ch. 347 at 26,891," 787 F.2d at 964, this is exactly what Agent Hanson did.

Here the taxpayer is branded as a criminal suspect, with no criminal charge yet filed much less tried. The statement of criminal investigation was a disclosure of

return information. The disclosure was not authorized. It was a violation of statutorily imposed confidentiality. The IRS having acknowledged that it would continue to include this statement in inquiries to patients, the taxpayer was entitled under the Tax Reform Act of 1976 to have this destructive and wholly unnecessary disclosure forbidden.

Possible Criminal Penalties
Damage Suit Illusory

The Court holds that the only protection a taxpayer has for a violation of the Tax Reform Act of 1976, is possible criminal prosecution of the offending employee or a damage suit against the United States.

This affords no real protection to the affected taxpayer. Prospective criminal penalties lie in the almost limitless discretion of the prosecutor. Considering that the Department of Justice is the principal advocate against *Texas Heart* there is no realistic likelihood that criminal prosecution would be initiated against Agent Hanson. The damage suit remedy is equally fruitless.[20]

Even more than litigious frustration, the damage remedy—no matter how extravagant the damage award—cannot undo the harm wrought by the illegal disclosure. Here, revealing that the Doctor is under criminal investigation is of irreparable damage to his personal and professional reputation. Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations.

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20. Dr. Barrett's efforts met with opposition from the government requiring an appeal (and subsequent reversal) of the summary judgment in favor of the government. *Barrett II*, 804 F.2d at 1381.

In the words of *Arthur Young*, the Tax Reform Act of 1976 and Section 6103(k)(6) are the "sort of unambiguous directions from Congress" that support the mild conditions of *Texas Heart*.

Agent Hanson Above the Law

The President must comply with Section 6103. The Congress and its committees must comply with Section 6103. The Department of Justice and all other executive departments or agencies must comply with Section 6103.[21]

But Agent Hanson need not.

Worse. A Court has no power to forbid his violation.

Texas Heart would prevent this. But alas, *Texas Heart* is no more, so I must dissent.

ALVIN B. RUBIN, Circuit Judge, with whom E. GRADY JOLLY, Circuit Judge, joins dissenting:

Respectfully, I conclude that this case is moot, and that we therefore lack jurisdiction. As the majority opinion notes, we have repeatedly held that an appeal from an order enforcing a summons becomes moot once a taxpayer complies with the summons. That rule is not altered by the fact that panels of this court have in the past "consistently treated the issues of (1) whether the enforcement order was properly rendered and (2) whether an enforcement order can be conditionally enforced as distinct issues on appeal."[1] We can and should reach the

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21. Section 6103 takes precedence over even the Freedom of Information Act. *See, Church of Scientology v. Internal Revenue Service*, ____U.S. ____, 108 S. Ct. 271, 98 L.Ed.2d 228 (1987).

1. 837 F.2d at 1348.

second question only if we conclude that the validity of the enforcement order is still an issue.

Whether "the conditional enforcement issue . . . attack[s] the validity of the district court's order to enforce the summons"[2] is not the question. The validity of the enforcement order, conditional or not, can no longer be contested. The summons has been issued, it has been complied with, and whether this court should now modify an order that has already been obeyed is simply a dead issue.

The opinion dissenting from the decision on the merits argues that the issue is not moot because the issue was raised in the court, briefed and argued on appeal, and counsel for both sides seek its decision. That was the situation in *Burke v. Barnes*,[3] but the Supreme Court found that the adequacy of the presentation of the issue and the parties' avidity for its decision did not prevent the case from having become moot.

Because the majority opinion overturns our decision in *Texas Heart*, because even those of my colleagues who dissent are eager to consider the correctness of that opinion, and because we have convened the full panoply of an en banc court to consider this case, I understand the sentiment that we should decide the substantive issue it presents. My colleagues must indeed feel that, having thus laboriously marched up the hill, we should not now discard all that effort and march down again. Nevertheless, I would resist the temptation to expatiate on a question that is not truly before us.

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2. *Id.*, 837 F.2d at 1348.

3. _____U.S._____, 107 S. Ct. 734, 93 L.Ed.2d 732 (1987).

UNITED STATES of America and Michael O. Hanson, Special Agent of the Internal Revenue Service, Plaintiffs-Appellees,

v.

Bernard M. BARRETT, Jr., as President of Plastic and Reconstructive Surgeons, P.A., Houston, TX, Defendant-Appellant.

No. 85-2054.

United States Court of Appeals, Fifth Circuit.

March 2, 1987.

Edward D. Urquhart, Charles J. Escher, Urquhart & Hassell, Houston, Tex., for defendant-appellant.

William A. Whitledge, Washington, D.C., Henry K. Oncken, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Div., Michael L. Paup, Chief, U.S. Dept. of Justice, Washington, D.C., Charles E. Brookhart, Washington, D.C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas; James DeAnda, District Judge.

Before CLARK, Chief Judge, [GEE], RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(5 Cir., 1986, 804 F.2d 1376)

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES of America and Michael O. Hanson, Special Agent of the Internal Revenue Service, Plaintiffs-Appellees,

v.

Bernard M. BARRETT, Jr. as President of Plastic and Reconstructive Surgeons, P.A., Houston, Texas, Defendant-Appellant.

No. 85-2054.

United States Court of Appeals, Fifth Circuit.

Dec. 3, 1986.

The United States brought action to enforce Internal Revenue Service summons. The United States District Court for the Southern District of Texas at Houston, James DeAnda, J., entered enforcement order, and taxpayer appealed. The Court of Appeals held that taxpayer, a medical doctor who was subject to IRS criminal investigation, was entitled to district court determination of whether enforcement of IRS summons should be conditioned in order to protect taxpayer against unnecessary disclosure of fact that he was under criminal investigation.

Affirmed and remanded.

Robert Madden Hill, Circuit Judge, concurred and filed opinion in which Reavley, Circuit Judge, joined.

Brown, Circuit Judge, concurred and filed opinion.

Opinion, 5th Cir., 787 F.2d 958, withdrawn.

Edward D. Urquhart, Urquhart & Hassell, Charles J. Escher, Houston, Tex., for defendant-appellant.

William A. Whitledge, Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., Henry K. Oncken, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief Asst. Atty. Gen., Charles E. Brookhart, Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, REAVLEY and HILL, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 16, 1986, 5 Cir. 1986, 787 F.2d 958)

PER CURIAM:

After receiving the application for rehearing we have decided that we misgauged the scope of our prior holding in *United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985). Accordingly we withdraw our opinion and substitute the following in its stead.

In this appeal, Dr. Bernard M. Barrett, Jr. challenges the district court's order enforcing an Internal Revenue Service (IRS) summons directing him to produce all the financial records of his incorporated medical practice. We affirm the district court's order enforcing the summons but remand for resolution of Barrett's claim that, to prevent an abuse of the court's process, the order should be modified so as to prohibit the IRS from violating the terms of 26 U.S.C. § 6103(a).

I.

Barrett is the president of an incorporated medical practice specializing in plastic and reconstructive surgery. In 1979 the IRS began an audit of Barrett's personal and corporate income tax returns for the years 1976, 1977 and 1978. When the initial investigation uncovered a $100,000 discrepancy between Barrett's books and his bank records, the IRS transferred the case from its civil to its criminal division.

Agent Michael O. Hanson, to whom the case was transferred, determined that it would be necessary to inquire of Barrett's patients the amount each had payed for Barrett's services. To this end, Agent Hanson sent two sets of summonses calling for patient's records, one to the hospitals where Barrett practiced and one to Barrett himself. All but four of the hospitals complied with the summonses providing a total of 350 patients' names. Agent Hanson then sent a letter to each patient advising that Barrett was being investigated by the Criminal Investigation Division of the IRS and requesting documentation of fees paid to Barrett. The IRS's right to enforce the summonses issued to the four noncomplying hospitals was litigated in this court in *United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985). The instant appeal involves the validity of the district court's decision to enforce the IRS summons issued to Barrett.

Barrett maintains that the summons was not issued to him for a legitimate purpose. Alternatively Barrett urges this court to follow the example of *Texas Heart* and to remand for further proceedings to determine whether the district court's enforcement order should be

modified so as to prohibit the IRS from informing his patients that he is under criminal investigation.

II.

[1] Barrett has fully complied with the district court's order requiring him to release the names of his patients. His claim that the district court based its decision to enforce the summons upon an erroneous finding that the IRS possesses a legitimate investigatory purpose[1] is therefore moot. *Grathwohl v. United States,* 401 F.2d 166 (5th Cir. 1968); *Lawhon v. United States,* 390 F.2d 663 (5th Cir. 1968).

Barrett's claim that he is entitled to remand under *Texas Heart* is less easily disposed of. At the time of this appeal, the IRS has not yet conducted mailings to Barrett's office patients. If Barrett was entitled, in the first instance, to obtain an order from the district court prohibiting certain uses of the summoned information, we see no reason why he should not be entitled to have those restrictions imposed upon remand. The question we must answer, then, is whether in an enforcement proceeding the district court could have appropriately restricted the IRS in the manner that it conducted mailings to Barrett's patients.

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1. Under *United States v. Powell,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 254-55, 13 L.Ed.2d 112 (1964), the government must meet four requirements in order to obtain enforcement of its summons by a district court: the government must show (1) that the summons was issued for a legitimate purpose; (2) that the information sought may be relevant to that purpose; (3) that the information sought is not already within the IRS Commissioner's possession; and (4) that all administrative steps required by the Internal Revenue Code have been followed.

III.

Section 6103(a) of the Internal Revenue Code[2] sets forth the general rule that tax return information is confidential and may not be disclosed by officers and employees of the United States.[3] This general right of privacy is limited by section 6103(k)(6) which provides:

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available. . . .

The Code provides both criminal penalties against individuals who violate the non-disclosure provisions of section 6103 and a civil right of action for damages against the United States for those whose return information is impermissibly disclosed. Section 7213 makes it unlawful to disclose any return or return information, except as authorized by the Code, and punishes a willful violation of that section by five years' imprisonment or a $5,000 fine, or both. Section 7431 provides to the individual whose return information is unlawfully disclosed a right of action for damages against the United States and sets the minimum amount of the damages at $1,000 for each unauthorized disclosure. Barrett maintains that in addition to these statutory remedies for

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2. All references hereinafter to sections of the Code are under 26 U.S.C.

3. It is conceded by the government that the proposed mailings to Barrett's patients contain "return information."

violations of section 6103(a), *Texas Heart* permits him to challenge the IRS summons as an abuse of process at the enforcement proceedings. The IRS contends the proper forum for defining the interplay between sections 6103(a) and 6103(k)(6) is not an enforcement hearing but a civil or criminal trial as explicitly provided for by sections 7213 and 7431 of the Code.

[2] We find that *Texas Heart* supplies the law of the case and that Barrett is entitled to a determination by the district court whether unconditional enforcement of the IRS summons would constitute an abuse of its process.

In *Texas Heart* we found that the disclosure by the IRS to Barrett's patients that he was under criminal investigation might be an unauthorized disclosure of return information prohibited by section 6103. On remand we directed the district judge to make three determinations:

> (i) whether the statement in the prior patient mailings that Dr. Barrett was under criminal investigation was a disclosure of "return information" under section 6103; and, if so,
>
> (ii) whether the disclosure of that informaiton was authorized under section 6103(k)(6); and
>
> (iii) whether enforcement of the summons should be conditioned upon requiring the IRS to desist from further unlawful disclosures.

755 F.2d at 482.

While we do not explicitly state in *Texas Heart* that the district court is empowered to make section 6103 determinations in an enforcement hearing, our treatment of the cause on remand can be reconciled with no other

view of the case. Accordingly, we find that our mandate in *Texas Heart* requires the district court to consider whether enforcement of the IRS summons should be conditioned in order to protect Barrett against unnecessary disclosure of the fact that he is under criminal investigation. We affirm the order of the district court enforcing the IRS summons; we remand for the district court to determine whether the summons should be conditionally enforced.

AFFIRMED and REMANDED.

ROBERT MADDEN HILL, Circuit Judge, with whom Circuit Judge REAVLEY joins, concurring:

While I am compelled by our holding in *United States v. Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985), to join in the panel's opinion, I believe that the result reached today is out of step with the Supreme Court's expansive reading of 26 U.S.C. § 7602 which grants the IRS the authority to "examine any books, papers, records or other data which may be relevant . . . [and to summon] any person having possession of books of account . . . relevant or material to such inquiry."

The statutory right to privacy asserted by Barrett imposes significant limitations on the IRS's power under section 7602 to collect information which is *relevant* to its investigation. Had *Texas Heart* examined the authorities which address the scope of the IRS's powers under section 7602 I believe it would have discerned a common theme; they all decline to circumscribe purposeful and productive exercise of these powers "absent unambiguous directions from Congress." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502, 79

L.Ed.2d 826 (1984) (quoting *United States v. Bisceglia,* 420 U.S. 141, 150, 95 S. Ct. 915, 920, 43 L.Ed.2d 88 (1975)); *United States v. Euge,* 444 U.S. 707, 715, 100 S. Ct. 874, 880, 63 L.Ed.2d 141 (1980). The following summary of the relevant authority supports this conclusion.

In *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964), for example, the Supreme Court refused to read into section 706(b), prohibiting "unecessary examination[s]," a requirement that enforcements of summonses be founded on probable cause. The Court reasoned that "[a]lthough a more stringent interpretation is possible . . . we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted. . . ." 379 U.S. at 53-54, 85 S. Ct. at 252-53, *quoted in United States v. Euge,* 444 U.S. at 715, 100 S. Ct. at 880. Similarly in *Donaldson v. United States,* 400 U.S. 517, 91 S. Ct. 534, 27 L.Ed.2d 580 (1971), the Court declined to limit the summons authority to cases where no criminal prosecution was contemplated. "Any other holding," said the Court, "would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.' " 400 U.S. at 533, 91 S. Ct. at 543. Again, in *United States v. Bisceglia,* 420 U.S. 141, 95 S. Ct. 915, 43 L.Ed.2d 88, the Court, finding no discernible contrary purpose by Congress, upheld the IRS's authority under section 7602 to issue a "John Doe" summons to a bank to determine the identity of unknown individuals who might be liable for unpaid taxes. The Court again broadly construed the IRS's summonsing authority in *United States v. Euge* to permit it to compel the execution of handwriting samples. A contrary result,

reasoned the Court, would "stultify enforcement of federal law." 444 U.S. at 715, 100 S. Ct. at 880 (quoting *Donaldson v. United States*, 400 U.S. at 536, 91 S. Ct. at 545). Finally, in *United States v. Arthur Young & Co.*, the Court declined to accord a privilege to an auditor's tax accrual workpapers. "We are unable," wrote the Court, to "discern the sort of 'unambiguous directions from Congress' that would justify a judicially created work-product immunity for tax accrual workpapers summoned under § 7602." 465 U.S. at 816, 104 S. Ct. at 1502.

[3] The power to solicit information from third parties having financial dealings with a particular taxpayer is a vital part of the IRS's information-gathering authority. In connection therewith Congress has also seen fit to protect citizens from unnecessary intrusions into their privacy and has enacted civil remedies and criminal penalties. We have no indication, however, that Congress intended sections 6103 and 7431 to burden purportedly "summary" enforcement proceedings with the time-consuming litigation that section 6103(k)(6) determinations would entail. It is my belief that this statutory right of privacy is not without bounds; under the current jurisprudence of the Supreme Court it is circumscribed by the remedies explicitly made available by Congress. Although it seems to me that the IRS could pursue its investigation in the present case without informing all of Dr. Barrett's patients that he is under criminal investigation, I conclude that there is no basis for *Texas Heart's* expansion of the district court's authority in summary enforcement proceedings to find an abuse of discretion beyond those instances specifically envisioned by the Supreme Court in *United States v. Powell*, 379 U.S. 48, 58, 85 S. Ct. 248, 255, 13 L.Ed.

2d 112 (1964), namely, when "the summons has been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."

JOHN R. BROWN, Circuit Judge, concurring:

I write separately to emphasize my strong conviction that our holding in *United States v. Texas Heart*, 755 F.2d 469 (5th Cir. 1985), is not only controlling, but is also prudent. Dr. Barrett's request that the District Court protect his privacy rights by allowing conditional enforcement of the summonses does not restrict the IRS in their investigatory capacity beyond restrictions already imposed by Congress and the Supreme Court.

The mandate of *Texas Heart* provides for an easy and efficient method of avoiding the necessity of requiring the District Court to stand idly by while its processes are unnecessarily used to inflict damage upon a taxpayer's reputation when such harm can easily be prevented.

Texas Heart explicitly provides that:

> the district court has discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further unlawful disclosures.

755 F.2d at 482. Therefore, if it is an unlawful disclosure, *Texas Heart* vests authority in the District Court to discover and prohibit an abuse of discretion through summary enforcement proceedings.

My brothers continue to fear that permitting the District Court to inquire whether the breadth of the IRS summons, or the practices flowing from its use, can be

tailored so as not to collide with the congressional purpose of protecting the taxpayer from an unnecessary invasion of his/her privacy would burden the enforcement proceedings and/or expand the inquiry of the District Court beyond the limits of *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). This fear is unnecessary.

The IRS is already required to go before the District Court to prove that it possesses a legitimate investigative purpose for the summons. *Powell*, 379 U.S. at 57-58, 85 S. Ct. at 254-55. Much of the evidence pertinent to the existence of a proper legislative purpose will also be relevant to determining whether the disclosure of return information is necessary to obtain information not otherwise available. The determination of whether there exists a legitimate investigative purpose for the summons is not far removed from the determination of whether the practices flowing from its enforcement are an unnecessary invasion of privacy or threatened injury to the taxpayer's reputation.

Furthermore, my reading of the authorities compels the conclusion that such an inquiry is included in the District Court's review of IRS summonses. The Supreme Court stated that the IRS's power to collect information is limited where unambiguously directed by Congress. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502, 79 L.Ed.2d 826 (1984). Congress has expressly provided that the IRS investigative powers do not include the power for unnecessary invasions of privacy or injuries of a taxpayer's reputation. Sections 6103 and 7431 provide civil and criminal penalties to redress unnecessarily injurious enforcement processes by the IRS. Congress unambiguously stated that these reme-

dies were for unnecessary injuries; they did not say the injuries were necessary but unavoidable. Congress expressly limited the IRS investigative powers to prohibit the unnecessary injuries Dr. Barrett has petitioned the District Court to enjoin.

In these days of overloaded dockets and scarce judicial resources, the other panel members would require the taxpayer to commence a separate lawsuit to redress an injury which could be prevented through the immediately available vehicle of conditional enforcement at the summons enforcement hearing.

We need not speculate on the efficacy of any such proposed remedy. Indeed, Dr. Barrett attempted to follow this very path and comply with this panel's original holding by filing a civil action for damages under Section 7431. The District Court granted summary judgment for the government and Dr. Barrett was forced to bring his claim before the Fifth Circuit yet another time. This Court reversed the grant of summary judgment. *Barrett v. United States,* 795 F.2d 446 (5th Cir. 1986). After three cases in the District Court and three times in this Court—a total of twelve United States Judges—the doctor has yet to get the protection which *Texas Heart* assures.

Nowhere can the injustice of restricting taxpayers to post-injury remedies be seen as well as it can in this case. Dr. Barrett's attempts to follow the course of conduct urged by the concurring—yet unbinding—opinion have resulted in no relief and a considerable waste of time and money by the taxpayer, the government, and the courts. The position urged in this panel's original holding and in the concurring opinion on rehearing has already proven

that restricting the taxpayer to post-injury remedies is not only inefficient, but most importantly, it is ineffective. This rehearing is the fourth time this circuit has heard virtually the same claim by Dr. Barrett and has yet to provide him any relief. We now have the clear indication of the burden imposed upon these proceedings and the time-consuming litigation that sections 610[3] and 7431 entail; however, contrary to the concurring opinion, the true burden has resulted from prohibiting the District Court from examining the question at the summons enforcement hearings when it had all the evidence before it and was in a position to prevent both the harm and the wasteful, time-consuming litigation that has followed.

I do not believe Congress intended to preclude the courts from preventing unecessary injuries when they adopted legislation to compensate taxpayers for unnecessary injuries. Disclosing information which would violate sections 6103 and 7431 clearly constitutes an unlawful disclosure and would be an abuse of discretion to permit the disclosure of return information that is, by statute, not necessary to the investigation. Therefore, I read *Texas Heart's* mandate permitting the District Court to use conditional enforcement at the summons enforcement proceeding as totally consistent with the unambiguous intent of the guidelines established by Congress and interpreted by the Supreme Court.

UNITED STATES of America and Michael O. Hanson,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

v.

Bernard M. BARRETT, Jr. as President of Plastic and
Reconstructive Surgeons, P.A., Houston, Texas,
Respondent-Appellant.

No. 85-2054.

United States Court of Appeals,
Fifth Circuit.

April 16, 1986.

United States brought action to enforce Internal Revenue Service summons. The United States District Court for the Southern District of Texas, James DeAnda, J., entered enforcement order, and taxpayer appealed. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that taxpayer, a medical doctor who was subject of IRS criminal investigation, was not entitled to have district court modify its enforcement order so as to prohibit IRS from informing his patients he was under criminal investigation.

Affirmed.

Brown, Circuit Judge, concurred in part and dissented in part with opinion.

Edward D. Urquhart, Urquhart & Hassell, Charles J. Escher, Houston, Tex., for respondent-appellant.

William A. Whitledge, Atty., Henry K. Oncken, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Division, Michael L. Paup, Chief, U.S. Dept. of Justice, Washington, D.C., Charles E. Brookhart, Atty., for petitioners-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, REAVLEY and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

Dr. Bernard M. Barrett, Jr., appeals from a district court order enforcing an Internal Revenue Service (IRS) summons directing him to produce all the financial records of his incorporated medical practice. We affirm.

I.

Barrett is the president of an incorporated medical practice specializing in plastic and reconstructive surgery. In 1979 the IRS began an audit of Barrett's personal and corporate income tax returns for the years 1976, 1977 and 1978. When the initial investigation uncovered a $100,000 discrepancy between Barrett's books and his bank records, the IRS transferred the case from its civil to its criminal division.

Agent Michael O. Hanson, to whom the case was transferred, determined that it would be necessary to inquire of Barrett's patients the amount each had payed for Barrett's services. To this end, Agent Hanson sent two sets of summonses calling for patient's records, one to

the hospitals where Barrett practiced and one to Barrett himself. All but four of the hospitals complied with the summonses providing a total of 350 patients' names. Agent Hanson then sent a letter to each patient advising that Barrett was being investigated by the Criminal Investigation Division of the IRS and requesting documentation of fees paid to Barrett. The IRS's right to enforce the summonses issued to the four noncomplying hospitals was litigated in this court in *United States v. Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985). The instant appeal involves the validity of the district court's decision to enforce the IRS summons issued to Barrett.

Barrett maintains that the summons was not issued to him for a legitimate purpose. Alternatively Barrett urges this court to follow the example of *Texas Heart* and to remand for further proceedings to determine whether the district court's enforcement order should be modified so as to prohibit the IRS from informing his patients that he is under criminal investigation.

II.

[1] Barrett has fully complied with the district court's order requiring him to release the names of his patients. His claim that the district court based its decision to enforce the summons upon an erroneous finding that the IRS possessed a legitimate investigatory purpose[1] is there-

1. Under *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 254-55, 13 L.Ed.2d 112 (1964) the government must meet four requirements in order to obtain enforcement of its summons by a district court: the government must show (1) that the summons was issued for a legitimate purpose; (2) that the information sought may be relevant to that purpose; (3) that the information sought is not already within the IRS Commissioner's possession and (4) that all administrative steps required by the Internal Revenue Code have been followed.

fore moot. *Grathwohl v. United States,* 401 F.2d 166 (5th Cir. 1968); *Lawhon v. United States,* 390 F.2d 663 (5th Cir. 1968).

[2] Barrett's claim that he is entitled to remand under *Texas Heart* is less easily disposed of. At the time of this appeal, the IRS has not yet conducted mailings to Barrett's office patients. If Barrett was entitled, in the first instance, to obtain an order from the district court prohibiting certain uses of the summoned information, we see no reason why he should not be entitled to have those restrictions imposed upon remand. The question we must answer, then, is whether in an enforcement proceeding the district court could have appropriately restricted the IRS in the manner that it conducted mailings to Barrett's customers.

Our analysis begins with the provisions of the Internal Revenue Code (Code), 26 U.S.C., which create in Barrett a right to privacy. Section 6103(a) sets forth the general rule that tax return information is confidential and may not be disclosed by officers and employees of the United States.[2] One exception to the general rule of confidentiality is described in section 6103(k)(6) which provides:

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available. . . .

2. It is conceded by the government that the proposed mailings to Barrett's patients contain "return information."

The Code provides both criminal penalties against individuals who violate the non-disclosure provisions of section 6103 and a civil right of action for damages against the United States for those whose return information is impermissibly disclosed. Section 7213 makes it unlawful to disclose any return or return information except as authorized by the Code, and punishes a willful violation of that section by five years' imprisonment or a $5,000 fine, or both. Section 7431 provides to the individual whose return information is unlawfully disclosed a right of action for damages against the United States and sets the minimum amount of the damages at $1,000 for each unauthorized disclosure.[3]

Our task is to determine how section 6103 meshes with section 7602 which authorizes the IRS to "examine any books, papers, records, or other data which may be relevant . . . [and to summon] any person having possession of books of account . . . relevant or material to such inquiry." We begin by noting that in construing the breadth of the summons authority Congress intended to grant the IRS, the Supreme Court has consistently declined to circumscribe purposeful and productive exercises of such authority "absent unambiguous directions from Congress." *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502, 79 L.Ed.2d 826 (1984) (quoting

3. Section 7431 was added to the Code by section 357(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324. Section 357(b)(1) repealed former section 7217 of the Code. Former section 7217 provided a right of action against the individual who made the disclosure, and remains effective for disclosures made prior to the effective date of TEFRA, September 3, 1982. Section 357(c) of TEFRA. Section 7217 would be applicable to Hanson's first mailing to Barrett's patients. Future contacts with patients which might be determined to be actionable would be governed by section 7431.

United States v. Bisceglia, 420 U.S. 141, 150, 95 S. Ct. 915, 921, 43 L.Ed.2d 88 (1975)); *United States v. Euge,* 444 U.S. 707, 715, 100 S. Ct. 874, 880, 63 L.Ed.2d 141 (1980). In *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964), for example, the Supreme Court refused to read into section 7605(b), prohibiting "unnecessary examination[s]," a requirement that enforcements of summonses be founded on probable cause. The Court reasoned that "[a]lthough a more stringent interpretation is possible . . . we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted. . . ." 379 U.S. at 53-54, 85 S. Ct. at 253, *quoted in United States v. Euge,* 444 U.S. at 715, 100 S. Ct. at 880. Similarly in *Donaldson v. United States,* 400 U.S. 517, 91 S. Ct. 534, 27 L.Ed.2d 580 (1971), the Court declined to limit the summons authority to cases where no criminal prosecution was contemplated. "Any other holding," said the Court, "would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.' " 400 U.S. at 533, 91 S. Ct. at 544. Again, in *United States v. Bisceglia* the Court, finding no discernible contrary purpose by Congress, upheld the IRS's authority under section 7602 to issue a "John Doe" summons to a bank to determine the identity of unknown individuals who might be liable for unpaid taxes. The Court again broadly construed the IRS's summonsing authority in *United States v. Euge* to permit it to compel the execution of handwriting samples. A contrary result, reasoned the Court, would "stultify enorcement of federal law." 444 U.S. at 715, 100 S. Ct. at 880 (quoting *Donaldson v. United States,* 400 U.S. at 536, 91 S. Ct. at 545). Finally, in *United States v. Arthur*

Young & Co., the Court declined to accord a privilege to an auditor's tax accrual workpapers. "We are unable," wrote the Court, "to discern the sort of 'unambiguous directions from Congress' that would justify a judicially created work-product immunity for tax accrual workpapers summoned under § 7602." 465 U.S. at 816, 104 S. Ct. at 1502.

The power to solicit information from third parties having financial dealings with a particular taxpayer is a vital part of the IRS's information-gathering authority. In connection therewith Congress has also seen fit to enact civil remedies and criminal penalties against unnecessary disclosures of confidential information. We have no indication, however, that Congress intended sections 6103 and 7431 to burden purportedly "summary" enforcement proceedings with the time-consuming litigation that section 6103(k)(6) determinations would entail.[4] We concur in the suggestion of *Texas Heart*[5] that a

4. The instant case is a perfect illustration of the wisdom of this position. While the IRS has been racing the statute of limitations Barrett has been leisurely asserting his section 6103(a) claims in the district and appellate courts. If we were to remand this case as Barrett desires, the statute of limitations would be almost certainly run with respect to the 1979 tax year before the IRS learned whether or not it had the authority to proceed with its investigation.

5. In admonishing the district court on remand not to refuse to enforce the summonses altogether, the *Texas Heart* court advised that "even if the past disclosure was improper, the district court has discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further unlawful disclosures." 755 F.2d at 482. We do not attach the same degree of significance to this statement as does the dissent. The district court indeed does have "discretion to condition enforcement of the summonses" if unconditional enforcement would constitute an abuse of the court's process. But, whether the IRS's efforts to obtain enforcement amount to an abuse of process is an issue left unresolved by *Texas Heart*. The opinion holds only that "*it may well be* an abuse of process to

district court may inquire at an enforcement proceeding about the IRS's plans to conform to section 6103, and it seems to us that the IRS could pursue its investigation in the present case without informing all of Dr. Barrett's patients that he is under criminal investigation. The taxpayer's remedy, however, for unlawful violation of section 6103(a) are the civil provisions set forth in section 7431. The district court's authority to find an abuse of process is limited to those instances specifically envisioned by the Supreme Court, namely, when "the summons has been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell,* 379 U.S. at 58, 85 S. Ct. at 255.

We AFFIRM the order of the district court enforcing the IRS summons issued to appellant Barrett.

JOHN R. BROWN, Circuit Judge, concurring in part and dissenting in part.

I concur in the Court's holding that the District Court correctly ordered enforcement of the IRS summons. I dissent from the opinion of the majority in its failure to require the District Court to consider whether the IRS

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allow enforcement of summonses when the IRS concedes it will continue to unlawfully disclose taxpayer return information." 755 F.2d at 482 (emphasis added). On remand, *Texas Heart* instructed the district court to determine whether the IRS was authorized, under section 6103(k)(6) to disclose the fact of the IRS's investigation of Barrett to his patients; it did not, however, instruct the district court to decide whether enforcement of the summonses would constitute an abuse of process. The opinion merely states that "[t]he district court's [previously expressed] concern regarding an abuse of process is reached only if it concludes that disclosure by the IRS is not authorized." *Id.* at 482.

letters to Dr. Barrett's patients could permissibly refer to the fact that the physician was under "criminal investigation."

In a Nutshell

In my view, the decision of the majority is deficient in two respects. First, the panel purports to displace the holding of *Texas Heart* with "a new rule [that] henceforth a taxpayer's sole remedy for unlawful violations of § 6103(a) shall be the civil provisions set forth in § 7431." Second, and more importantly, the majority reaches an unsound result. I cannot believe that a District Court is required to stand idly by while its processes are unnecessarily used to inflict damage upon a taxpayer's reputation.

Conditional enforcement of an IRS summons provides an easy and efficacious means of avoiding that result, and because the majority fails to apply and enforce the holding and the mandate of *Texas Heart* in that regard, I must dissent.

The Mandate in Texas Heart

In 1979, the IRS commenced an investigation of the personal and corporate tax returns of Dr. Barrett. That investigation culminated in the issuance of two summonses: one to Dr. Barrett, and one to each of the hospitals at which he practiced medicine. Each summons demanded the production of patient records in order to identify the patients of Dr. Barrett so that the IRS could compare payments made by patients and insurers with income actually reported by the Physician. By obtaining patient names through the mechanism of the summons, the IRS could use that information to contact each patient

directly, by mail, in order to obtain information pertinent to their transactions with Dr. Barrett. Over 350 of Dr. Barrett's patients—identifed through the hospitals' response to the summons—eventually received a letter from the IRS, written on the letterhead of the agency's Criminal Investigation Division, which began with the following sentence "the above named individual [Dr. Barrett] is currently under investigation by the Criminal Investigation Division of the Internal Revenue Service."

Four hospitals did not comply with the summons. On June 21, 1983, the IRS filed a petition for enforcement of its summons against them. Dr. Barrett intervened in that proceeding. On December 6, 1983, enforcement of the summons was denied by Judge Black. On December 12, 1983, six days after Judge Black denied enforcement against the hospitals, the IRS filed a separate petition for enforcement of its summons against Dr. Barrett. That proceeding was docketed in Judge DeAnda's court and, on December 10, 1984, Judge DeAnda enforced the summons against Dr. Barrett.

The IRS appealed Judge Black's denial of enforcement against the hospitals. The validity of that summons, without which the mass mailing could not have proceeded, was litigated in that appeal and gave rise to the mandate in *Texas Heart*. In *Texas Heart*, the Court recognized that the disclosure in the patient letter of the fact that Dr. Barrett was under criminal investigation might be an unauthorized disclosure of return information as defined in § 6103. It held, however, that "even if the IRS unlawfully disclosed . . . that Dr. Barrett was under criminal investigation, that disclosure does not demonstrate [a] lack of a legitimate investigative purpose for the investigation in this case." 755 F.2d at 480.

It remained to be seen, however, whether the enforcement of the summons could nonetheless be tailored to protect Dr. Barrett against the disclosure of the fact that he was under criminal investigation. That disclosure, if permitted to occur, would very likely be injurious to the physician's professional, as well as to his personal, reputation. Because it recognized that such a disclosure could have grave and lasting consequences, the Court in *Texas Heart* remanded the case to the district judge for three critical determinations:

> (i) whether the statement in the prior patient mailings that Dr. Barrett was under criminal investigation was a disclosure of "return information" under § 6103; and, if so,
>
> (ii) whether the disclosure of that information was authorized under § 6103(k)(6) which permits the disclosure of return information to the extent such disclosure is necessary to obtain information not otherwise reasonably available; and, if the disclosure was not authorized,
>
> (iii) whether the enforcement of the summons should be conditioned by requiring the IRS to desist from further unlawful disclosures.

755 F.2d at 482.

The present appeal arises from the separate summary proceeding instituted to enforce the summons issued to Dr. Barrett. In that proceeding, Dr. Barrett had objected that the intended use of the summons information—blind mailings to patients disclosing the fact that he was under criminal investigation—was a violation of his privacy rights. Judge DeAnda, however, unconditionally enforced the summons and Dr. Barrett then appealed.

Dr. Barrett contends on appeal that this case should be remanded to the District Court in light of the holding in *Texas Heart*. In *Texas Heart*, the Court expressly stated that "it may well be an abuse of process to allow enforcement of summonses when the IRS concedes it will continue to unlawfully disclose taxpayer return information." 755 F.2d at 482. To guard against such potential abuses, the Court made the following unequivocal statement:

> The Court reiterates that even if the past disclosure was unlawful, the district court has discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further unlawful disclosures.

Id. Dr. Barrett contends that, in light of this holding, the District Court should be required to consider whether the enforcement of the summons should be conditioned in order to protect him against the unnecessary disclosure of the fact that he is under criminal investigation.

Rejecting Re-Examination of Texas Heart

In my view, the remand sought by Dr. Barrett is essential. I dissent from the opinion of the majority because, in failing to so hold, it reexamines *Texas Heart* and implicitly overrules an essential part of the holding of the case. That is something which we, as a three-judge panel of this Circuit, are not empowered to do. *United States v. One 254 Foot Freighter, the M/V ANDORIA*, 768 F.2d 597, 602 (5th Cir. 1985); *Fritiofson v. Alexander*, 772 F.2d 1225, 1237 n. 6 (5th Cir. 1985); *United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th

Cir. 1984); *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982).

In its own words, the majority states "the question we must answer, then, is whether in an enforcement proceeding the District Court could have appropriately restricted the IRS in the manner that it conducted mailings to Dr. Barrett's customers." That question is no longer open. It was answered by the Court in *Texas Heart*. The answer was emphatic:

> the district court has discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further unlawful disclosures.

755 F.2d at 482. That decision is binding on us and will remain so until overturned either by the Supreme Court or by this Court sitting en banc. To purport to replace that holding with "a new rule" that denies the existence of such discretion is simply not a decision which is within the province of this panel.

The New Rule

The majority states that "henceforth a taxpayer's sole remedy for unlawful violations of § 6103(a) shall be the civil provisions set forth in § 7431." It justifies this decision by stating that it has "no indication . . . that Congress intended §§ 6103 and 7431 to burden purportedly 'summary' enforcement proceedings with the time-consuming litigation that § 6103(k)(6) determinations would entail." One wonders, however, where the burden really lies and just how heavy or time-consuming it truly is.

Unless acquiesced in, the IRS is already required to seek enforcement of its summonses in the District Court,

where it must prove that it possesses a legitimate investigative purpose for the summons. *United States v. Powell,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). Given that a hearing is already required to determine whether such a legitimate investigative purpose exists, it does not appear unreasonable to permit, or to require, a District Court to inquire at that proceeding into whether the breadth of the IRS summons, or the practices flowing from its use, can be tailored so as not to collide with the Congressional intent to protect the taxpayer against unnecessary invasions of his privacy. Much of the evidence pertinent to the existence of a legitimate investigative purpose for the summons will also be relevant to the determination of whether the disclosure of return information is necessary to obtain information that is otherwise not reasonably available. *See* 26 U.S.C. § 6103 (k)(6). The determination of whether there exists a legitimate investigative purpose for the summons is certainly not far removed from the determination of whether the practices flowing from its enforcement are an unnecessary invasion of privacy or threaten injury to a taxpayer's reputation.

The result of the majority's opinion, however, is that the District Court is required to stand idly by and enforce a summons which unnecessarily subjects a taxpayer to the ridicule and humiliation of being labeled as a criminal tax evader in the eyes of his fellows. This case presents a perfect illustration of the harm which will be wrought by adhering to such a result. Despite the instruction in the IRS Manual that "caution must be exercised not [to] damage the reputation of the taxpayer by making [a mass mailing] either offensive or suggestive of any wrongdoing by the taxpayer," 5 CCH Internal Revenue Manual

¶ 9781 ch. 347 at 26,891, Agent Hanson's letter to Dr. Barrett's patients began with the startling disclosure that the physician was "currently under investigation by the Criminal Investigation Division of the Internal Revenue Service." That language cannot, by any stretch of the imagination, be termed cautious. Indeed, the IRS Manual instructs its agents that "appropriate wording [for a mass mailing] could be 'the Internal Revenue Service is conducting *an investigation* of [taxpayer's name].'" *Id.* (Emphasis added).

The Government, in response to a specific request by the Court at oral argument for any authoritative statement on behalf of the Department of Justice, justifies the letter on the grounds that if, in a follow-up to the letter an agent were to interview one of Dr. Barrett's patients who has been identified as a result of the summons, the agent would be required to identify himself as a special agent affiliated with the Criminal Investigation Division. I recognize that many factors—some approaching considerations of due process—support this requirement. But we deal here not with a true field investigation. Instead, we have only the broadside, initial inquiry to hundreds of unsuspecting persons who may well harbor a godfather image of their doctor.

An entire reputation was jeopardized by the injudicious, inappropriate, and wholly unnecessary use of language by Special Agent Hanson, and by the IRS' disclosure of the fact that Dr. Barrett was under criminal investigation. Among the sophisticated clientele of a plastic surgeon, the reference to a "criminal investigation" is far from an innocuous indication that Dr. Barrett's tax returns—like those of innumerable, honest business and professional people—reflected signs of neglect or mistake. Rather,

the language used in the letter was a tell-tale pronouncement to the public that the IRS suspected that Dr. Barrett's conduct met the severe standards of willful violation for which the physician was subject to criminal charges, indictment, possible conviction, and a penitentiary sentence.

The disclosure of the fact that Dr. Barrett was under criminal investigation, in my view, could not possibly have been reasonably necessary to obtain information that would not otherwise be available. It seems unlikely to me that the number of responses received by the IRS, 81 to be exact, would have differed significantly, had the letter disclosed only the fact that the income taxes of Dr. Barrett were under investigation. At the very least, it is clear that under our binding decision in *Texas Heart* it is up to the district judge to consider, at the enforcement proceeding, whether such a disclosure is reasonably necessary and whether he should condition his enforcement by eliminating such unnecessary disclosures that will mark the identified taxpayer as a federal criminal.

The majority concludes, nonetheless, that the problem is most adequately addressed through the vehicle of an action in damages under § 7431. In these days of overloaded dockets and scarce judicial resources, the majority requires that the taxpayer commence a separate lawsuit to redress his injury, rather than avoiding the harm through the immediately available vehicle of conditional enforcement. In these days of budgetary deficits, they choose as the preferred remedy a damage action, when the necessity for paying such damages could be avoided in the first instance at the summons enforcement hearing.

That is why their decision is, in my view, simply unsound and is why I dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1170

UNITED STATES OF AMERICA
and Michael O. Hanson, Special Agent of the
Internal Revenue Service

v.

BERNARD M. BARRETT, JR.,
as President of Plastic and Reconstructive
Surgeons, P.A., Houston, Texas

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried upon the facts without a jury, the Court hereby enters the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a), F.R.C.P.

FINDINGS OF FACT

The Plaintiffs are the United States of America and Michael O. Hanson, Internal Revenue Service Special Agent.

At all times relevant to this lawsuit, the Defendant, Bernard M. Barrett, Jr., was the President of Plastic and Reconstructive Surgeons, P.A. of Houston, Texas.

On June 17, 1982, a summons was issued to and served on Bernard M. Barrett, Jr., as President of Plastic and Reconstructive Surgeons, P.A. The summons required the

doctor to appear and give testimony relating to the tax liability of Plastic and Reconstructive Surgeons, P.A. and to bring all documents and materials reflecting the receipt of taxable income by such entity for the tax years 1978, 1979 and 1980 so that the federal income tax liability of Dr. Barrett for such years could be assessed.

Dr. Barrett failed to appear at the time and place designated by the summons, nor did he produce the requested documents.

This Court ordered a show cause hearing scheduled for March 12, 1984.

The overwhelming weight of the evidence shows that the summons was issued in good faith with no intent to harass. The summons was issued after a civil audit was conducted by an Internal Revenue Service examiner and the case was referred to the Criminal Investigation Division of the Internal Revenue Service. The evidence shows that all administrative steps required by the Internal Revenue Code in issuing a summons were followed in all respects.

The evidence proves that the summons was issued to obtain records and documents of the professional association necessary to determine if some funds may have been diverted from the corporation to Dr. Barrett which were not taxed as either a corporate tax or an individual tax.

The evidence shows that the Internal Revenue Service civil examiner referred the case to the Internal Revenue Service Criminal Investigation Division because of the discrepancies in the doctor's bank deposits and information on his tax return. There is no evidence to prove that the Internal Revenue Service civil examiner referred

this case to the Internal Revenue Service Criminal Investigation Division because Dr. Barrett did not agree to sign a second extension of the statute of limitations.

The evidence does not show that the doctor's accountant was threatened with a jeopardy assessment if he did not get Dr. Barrett to sign an extension of the statute of limitations.

The evidence clearly establishes the Internal Revenue Service's need for the documents and records requested in the summons. The Internal Revenue Service was given access to these documents previously in the course of their investigation but copies of such documents are necessary to the investigation and the evidence shows that such documents are not currently in the possession of the Internal Revenue Service.

There was no evidence presented to prove that the Internal Revenue Service was seeking the information contained in the documents for the purpose of disclosing said information to the patients of the doctor. The evidence did show that the documents containing the files on Dr. Barrett's patients were necessary to determine the form of payment tendered and to corroborate the doctor's tax records.

The evidence establishes that all documents requested in the summons are relevant to the Internal Revenue Service's investigation of Dr. Barrett and that such request is not overly broad in scope.

CONCLUSIONS OF LAW

The Court has jurisdiction of this cause by virtue of 26 U.S.C. § 7402(b) and 26 U.S.C. § 7604(a).

The Supreme Court of the United States has clearly defined the law applicable to summons enforcement actions and has established standards the Petitioners must meet to have the summons enforced. *United States v. LaSalle National Bank,* 437 U.S. 298 (1978). Before such summons will be enforced, the Petitioners have to establish a *prima facie* case by showing "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *United States v. Powell,* 379 U.S. 48, 57-58 (1964). The case at bar is governed by the *Powell* standards.

Based on the above fact finding, the Petitioners have proved their *prima facie* case. Once the *prima facie* case is established, "the burden shifts to the taxpayer to come forward with rebutting evidence. Simply denying the existence of the *Powell* elements . . . will not serve to defeat the Internal Revenue Service's *prima facie* case." *United States v. Southeast First National Bank,* 655 F.2d 661, 664 (5th Cir. 1981). This burden the Respondent must meet under *Powell* "is a heavy one." *The United States v. LaSalle National Bank,* 437 U.S. at 316.

When we apply the legal principles outlined above to the findings of fact in the instant case, it is clear that the Petitioners have established a *prima facie* case and the Respondent has failed to carry its burden to rebut—hence judgment must be entered for the Petitioners.

As required by *Powell,* the Petitioners have proven that the investigation was for a legitimate purpose, that the inquiry was relevant, that the information sought was

not already in the Commissioner's possession, and that the administrative steps required by the Internal Revenue Code had been followed. *United States v. Powell,* 379 U.S. at 57-58. The five defenses raised by the Respondent are without merit.

The Court concludes that the Petitioners have established the propriety of enforcement of the summons in all respects.

DONE in Houston, Texas, this 10th day of December, 1984.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1170

UNITED STATES OF AMERICA
and Michael O. Hanson, Special Agent
of the Internal Revenue Service

v.

BERNARD M. BARRETT, JR.,
as President of Plastic and Reconstructive
Surgeons, P.A., Houston, Texas

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law in the above-referenced cause on this date, judgment is hereby entered for Petitioners, United States of America and Michael O. Hanson.

All taxable costs are hereby assessed against the Respondent, Bernard M. Barrett, Jr.

This is a Final Judgment.

DONE in Houston, Texas, this 10th day of December, 1984.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1170

UNITED STATES OF AMERICA
and Michael O. Hanson, Special Agent
of the Internal Revenue Service

v.

BERNARD M. BARRETT, JR.,
as President of Plastic and Reconstructive
Surgeons, P.A., Houston, Texas

MEMORANDUM AND ORDER

Pending before the Court is the Respondent's Motion For Stay of Execution of Judgment on the Final Judgment entered by this Court on December 10, 1984. After reviewing the record and the applicable law, the Court concludes such motion shall be denied.

The Respondent alleges that the Court failed to address in its Findings of Facts and Conclusions of Law Respondent's contention of a violation of the Constitutional right to privacy under the Fourth Amendment. However, Respondent ignores the fact that this issue was never presented to the Court in any of the pleadings. The Court concludes that the allegations of the Resonent in such motion in all respects fail to establish a substantial likelihood of success on the merits, therefore, this Court does not need to determine the irreparable harm issue.

It is hereby ORDERED that Respondent's Motion For Stay of Execution of Judgment be DENIED.

DONE in Houston, Texas, this 19th day of December, 1984.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1170

UNITED STATES OF AMERICA
and Michael O. Hanson, Special Agent
of the Internal Revenue Service

v.

BERNARD M. BARRETT, JR.,
as President of Plastic and Reconstructive
Surgeons, P.A., Houston, Texas

MEMORANDUM AND ORDER

Pending before the Court is Respondent's Motion to Reconsider this Court's Order of December 19, 1984 denying the Motion of Respondent For Stay of Execution of Judgment on the Final Judgment entered by this Court on December 10, 1984. After reviewing the record and the applicable law, the Court concludes such motion shall be denied.

The December 19, 1984 Memorandum and Order of this Court denying Respondent's Motion For Stay of Execution of Judgment clearly stated that allegations of the Respondent "in all respects" failed to establish a substantive likelihood of success on the merits. In addition this Court stated that the Respondent did not raise in his pleadings the violation of the constitutional right to privacy under the Fourth Amendment. The Respondent now requests the Court to reconsider its December 19,

1984 Order on the grounds that such privacy claims were raised in its original answer.

In the Respondent's original answer he alleged that the summons was so overly broad that it constituted an unreasonable search in violation of the Fourth Amendment. This constitutional protection against an unreasonable search is founded on the inherent privacy invasion created by such a search. By raising this Fourth Amendment claim the Respondent thus implicitly raised the privacy issue.

Under this interpretation the Court erred in its Order of December 19, 1984 in stating that the privacy issue was not raised in the Respondent's pleadings. However, this error in interpretation has no effect on the December 19, 1984 Order because the Court specifically addressed this privacy issue in its Findings of Fact and Conclusions of Law. The Court found that the documents requested were relevant to the investigation and were not overly broad. It follows from this finding of fact that no unreasonable search was conducted; therefore, there was no violation of the Respondent's constitutional right to privacy under the Fourth Amendment.

The Court also addressed in its Findings of Fact and Conclusions of Law the privacy implications as codified by 26 U.S.C. § 6103(a), (b) and (k)(6). Based on the evidence presented, the Court found that the summons was issued in good faith for a legitimate purpose with no intent to harass. The Court found that the evidence established a need for the documents and records requested and that there was no evidence to prove that the Internal Revenue Service was seeking the information for

the purpose of disclosing said information to the patients of the Respondent.

Clearly the Court in its Findings of Fact and Conclusions of Law addressed the privacy issues raised by the Respondent. Accordingly, the Court concludes that the Respondent's Motion to Reconsider Order is without merit in all respects.

It is hereby ORDERED that the Respondent's Motion to Reconsider Order be DENIED.

DONE in Houston, Texas, this 4th day of January, 1985.

JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-1170

UNITED STATES OF AMERICA
and MICHAEL O. HANSON, Special Agent
of The Internal Revenue Service

v.

BERNARD M. BARRETT, JR., as President of
PLASTIC AND RECONSTRUCTIVE SURGEONS,
P.A., HOUSTON, TEXAS

MEMORANDUM AND ORDER

Pending before the Court is the Respondent's motion for new trial. Having reviewed the Respondent's grounds for new trial and the applicable law, the Court concludes that such motion shall be denied.

The thrust of the motion is grounded on the fact that Respondent disagrees with the Court's Findings of Fact and Conclusions of Law in holding that the summons was issued for a proper purpose. The Respondent attacks the Court's balancing of privacy interests and the need for the Internal Revenue Service's investigation. The Respondent further disagrees with the Court's credibility determination of Special Agent Hanson. There is no apparent merit to these assertions of error and on these assertions the motion should be denied.

In addition the Respondent claims that "new evidence has been received regarding the credibility of the testimony of Revenue Agent Curtis-Brown in this matter."

This grounds for new trial is ill-founded because newly discovered evidence must be material, admissible, credible, not merely cumulative or impeaching and likely to change the outcome upon retrial. *Peacock v. Board of School Commissioners of Indianapolis,* 721 F.2d 210 (7th Cir. 1983); *Great American Indemnity Co. v. Brown,* 307 F.2d 306, 309 (5th Cir. 1962) and cases cited therein. An examination of Respondent's motion shows the proffered evidence could be used solely for impeaching Ms. Curtis-Brown and as such is very unlikely to change the outcome upon retrial.

Finally, the Respondent alleges the Court failed to consider the testimony adduced on March 19, 1984 because such hearing was never transcribed. Such grounds for new trial is totally without merit since the Court did consider the testimony of March 19, 1984 in making its ruling.

Accordingly, it is hereby ORDERED that Respondent's motion for new trial be DENIED.

DONE in Houston, Texas, this 10th day of January, 1985.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES of America and Internal Revenue Service Special Agent Michael O. Hanson,
Petitioners-Appellants,

v.

TEXAS HEART INSTITUTE and Greg C. Waddill, Associate Administrator and Counsel,
Respondents-Appellees,

Dr. Bernard M. Barrett, Jr.,
Intervenor-Appellee.

No. 84-2178.

United States Court of Appeals,
Fifth Circuit.

March 21, 1985.

IRS filed petitions to enforce summonses directed to four hospitals requesting hospitals to provide names and addresses of taxpayer's patients, as well as any information regarding amounts and method of payment for taxpayer's services. Summonses also requested names of patients' insurance companies. The United States District Court for the Southern District of Texas, Norman W. Black, J., denied enforcement, and IRS appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) IRS amply met initial burden of demonstrating requirements for enforcement of summonses through agent's declaration attached to petition to enforce and his testimony; (2) names and addresses of patients treated at hospitals were relevant to IRS investigation of taxpayer; (3) mere showing by taxpayer that IRS previously examined his own records was not sufficient to show either

that IRS possessed information sought or that it possessed information in custody of parties other than taxpayer; (4) failure of IRS to give taxpayer notice as provided in statute did not bar enforcement, since taxpayer could not demonstrate prejudice resulting from failure to give notice; (5) IRS demonstrated legitimate purpose for investigation; and (6) even if IRS unlawfully disclosed certain information, such disclosure did not demonstrate lack of legitimate purpose for investigation.

Vacated and remanded.

Daniel K. Hedges, U.S. Atty., Houston, Tex., Charles E. Brookhart, William A. Whitledge, Glenn L. Archer, Jr., Asst. Atty Gen., Michael L. Paup, Chief, Appellate Sec., U.S. Dept. of Justice, Washington, D.C., for petitioners-appellants.

Edward D. Urquhart, Silvia T. Hassell, Charles J. Escher, Houston, Tex., for Dr. Bernard M. Barrett, Jr.

Fulbright & Jaworski, Jasper G. Taylor, III, C. W. Wellen, Houston, Tex., for Texas Heart Institute, Tex. Children's, St. Luke's & Waddell.

Vinson & Elkins, H. Ronald Welsh, Joyce R. Scruggs, Woodward, Hall & Primm, Houston, Tex., for Methodist Hosp.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, JOHNSON, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:

The United States Internal Revenue Service (IRS) and IRS Agent Michael O. Hanson filed petitions to enforce four IRS summonses. These summonses were directed to the Texas Heart Institute, Texas Children's Hospital, St. Luke's Episcopal Hospital, and Methodist Hospital. All four petitions to enforce were consolidated. After a hearing, the district court denied enforcement of the summonses. The IRS and Agent Hanson appeal, asserting that the district court improperly denied enforcement of the summonses. This Court agrees. We vacate the order of the district court denying enforcement, and remand this case to the district court to enter an order enforcing the summonses to the extent discussed in this opinion.

I. BACKGROUND

Dr. Bernard M. Barrett, Jr., the taxpayer under investigation in the instant case, is a physician specializing in plastic and reconstructive surgery. Dr. Barrett is on the staff or permitted to practice at a number of hospitals in the Houston, Texas, area. At Dr. Barrett's direction, about forty percent of Dr. Barrett's patients receive some type of treatment or testing at a hospital. Dr. Barrett believes that many of his patients would not want it known that they have undergone plastic surgery. Therefore, Dr. Barrett strictly enforces a policy of confidentiality, and seeks to insure that even his patients' names are kept confidential.[1]

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1. Dr. Barrett takes numerous precautions to keep his patients' identities and medical information confidential. Dr. Barrett has made arrangements with the hospitals at which he practices to admit patients under false names or even under code numbers. Dr. Barrett has informed his employees that the divulging of a name or a procedure with respect to any patient can result in immediate dismissal.

In 1979, the IRS began an income tax audit of Dr. Barrett. Initially, Dr. Barrett gave the IRS agents involved complete access to all his records. The agents had difficulty reconciling the income reported by Dr. Barrett on his tax returns with the amounts shown in his records. The agents indicated to Dr. Barrett's accountant that the agents thought there was a discrepancy in Dr. Barrett's income.

In 1981, the case was referred to the Criminal Investigation Division (CID) of the IRS to determine whether criminal violations of the Internal Revenue Code had occurred. Eventually, the case was assigned to Special Agent Michael O. Hanson. Hanson determined it was necessary to verify the sums each of Dr. Barrett's patients had paid Dr. Barrett in order to determine whether Dr. Barrett had reported all his income for the years at issue. In order to obtain the names and addresses of some of Dr. Barrett's patients, Agent Hanson issued summonses to all the hospitals at which Dr. Barrett practiced. The summonses requested each hospital to provide the names and addresses of Dr. Barrett's patients, as well as any information regarding amounts and method of payment for Dr. Barrett's services. The summonses also requested the names of the patients' insurance companies. The summonses asked for this information for all of Dr. Barrett's patients admitted, treated, or tested at that hospital during the period 1976 through 1980.

All but four hospitals complied with these summonses. The Texas Heart Institute, Texas Children's Hospital, St. Luke's Episcopal Hospital, and Methodist Hospital all refused to comply with the summonses. From the hospitals that did comply with the summonses, the IRS obtained names of 350 patients. Each patient was sent

a form letter stating that Dr. Barrett was under investigation by the Criminal Investigation Division of the IRS, and requested each patient to provide the dates and amounts of payments they made to Dr. Barrett for medical services. The IRS received 81 responses. To date, no follow-up inquiries have been made to the remainder of the 350 patients.

Upon refusal by the four named hospitals to comply with the summonses, the Government filed petitions to enforce the summonses. Dr. Barrett intervened. The district court conducted a hearing where Agent Hanson and Dr. Barrett testified, along with other witnesses. At the conclusion of the hearing, the district court ruled that it would not enforce the summonses. The district court found that the IRS agents were acting on a good faith belief that tax fraud was involved. The district court, however, found that the summonses would only disclose the names and addresses of forty percent of Dr. Barrett's patients, while the IRS already had 100% of the names in Dr. Barrett's records. The district court based its ruling on four factors:

> One is the fact that you've got all the records you need in [Dr. Barrett's] office. . . .
>
> The second point I am basing it on is the fact that the hospital records of names and address[es] will only reach a small percentage of all the Doctor's patients.[2]
>
> I am also basing my ruling on the fact that prior attempts to contact patients for verifications of the

2. Only forty percent of Dr. Barrett's patients' names and addresses are in the possession of *all* the hospitals summoned.

> amounts they paid have not been very successful. . . .[3]
>
> And, as I say, I am concerned about the shotgunning of these people by sending out these form letters in a [manner] where they reached people who had no reason to be contacted at all, such as spouses.

Record Vol. 5 at 5.

The district court also stated that the evidence did not show that the only way the Government could get this information would be from the hospitals. Furthermore, the district court recited that the evidence did not show that the Government had made substantial efforts to get the information from other sources, and that the evidence did not show that the information would prove what the Government asserted it would prove.

The Government appeals the district court's denial of the enforcement petitions. The Government asserts that it met its initial burden under *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). The Government argues that the burden then shifted to the hospitals and Dr. Barrett and that the hospitals and Dr. Barrett failed to prove that the requirements of *Powell* were not met. Consequently, the Government

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3. Eighty-one of 350 patients responded to the prior mailing for a response rate of slightly greater than twenty percent. Dr. Barrett and the hospitals asserted that twenty percent (the response rate) of forty percent (the percentage of Dr. Barrett's patients treated at all hospitals) would indicate that only eight percent of all of Dr. Barrett's patients would respond to the IRS's mass mailing. It is noted, however, that the response rate might be much greater than the hospitals and Dr. Barrett asserted. Agent Hanson testified that he did not follow up on the prior mailing because he was awaiting the outcome in the instant case. Thus, it is very possible that the final response rate would be much greater than the eight percent figure urged by Dr. Barrett and the hospitals.

urges that the summonses should have been enforced. In contrast, the hospitals argue that they met their burden under *Powell.* Dr. Barrett further asserts that the Government failed to provide notice to him as required by 26 U.S.C. § 7609, and that the IRS agent involved disclosed return information in violation of 26 U.S.C. § 7213. This Court concludes that the Government carried its burden under *Powell,* while the hospitals and Dr. Barrett did not. Therefore, the order of the district court is vacated and the case remanded to the district court to enter an order enforcing the summonses to the extent discussed in this opinion.

II. STANDARD OF REVIEW

[1] As this Court stated in *United States v. Sun First National Bank*:

> Our review requires us to accept the facts found by the district court unless clearly erroneous, under F. R. Civ. P. 52(a), and to review the court's compliance with the mandates of *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). . . .

510 F.2d 1107, 1109 (5th Cir.), *cert. denied,* 423 U.S. 927, 96 S. Ct. 273, 46 L.Ed.2d 254 (1975). *See also United States v. Davis,* 636 F.2d 1028, 1035 (5th Cir.), *cert. denied,* 454 U.S. 862, 102 S. Ct. 320, 70 L.Ed.2d 162 (1981).

In *Powell,* the Supreme Court set forth four requirements for enforcement of a summons:

> [1] [The Commissioner] must show that the investigation will be conducted pursuant to a legitimate

> purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required by the Code have been followed . . .

Powell, 379 U.S. at 57-58, 85 S. Ct. at 255. The Supreme Court added a further consideration when it admonished that "[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell,* 379 U.S. at 58, 85 S. Ct. at 255 (footnote omitted).

[2] The Government initially bears the burden of demonstrating the first four *Powell* criteria. That initial burden is a minimal burden, which may be met by a simple affidavit filed with the petition to enforce the summonses by the agent who issued the summonses. *United States v. Davis,* 636 F.2d at 1034. *See United States v. Wyatt,* 637 F.2d 293, 299-301 (5th Cir. 1981). This was done by Agent Hanson in the instant case. *See also Powell,* 379 U.S. at 57, 85 S. Ct. at 255 (the IRS has authority to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not").

[3] Once this initial *Powell* showing has been made, the burden shifts to the parties resisting the summonses to demonstrate that the IRS has failed to meet its *Powell* burden, *Powell,* 379 U.S. at 58, 85 S. Ct. at 255; *United States v. Linsteadt,* 724 F.2d 480 (5th Cir. 1984); *Wyatt,* 637 F.2d at 301, *Davis,* 636 F.2d at 1034, or to assert and prove that enforcement would represent an abuse of the court's process, *Powell,* 379 U.S. at 58, 85 S. Ct. at 255; *United States v. LaSalle National Bank,* 437 U.S.

298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978); *Wyatt*, 637 F.2d at 301.

[4] This Court concludes that the Government amply met its initial burden through Agent Hanson's declaration attached to the petition to enforce and his testimony. Thus, the burden rests on the hospitals and Dr. Barrett to demonstrate that the Government has failed to meet one of the four requirements of *Powell* or that enforcement of the summonses would constitute an abuse of process. This Court concludes that the hospitals and Dr. Barrett have failed to meet their burden on each issue.

III. RELEVANCY

[5] The district court found that the records sought by the IRS were "not the records that are going to be of benefit" to the IRS, record Vol. 5 at 4, because only forty percent of Dr. Barrett's patients' names and addresses were available from the hospitals and the mailing would only gather about a twenty percent response from that forty percent. To the extent the district court required the IRS to show some "specific benefit" from the information sought, the district court applied an incorrect standard to determine the relevancy of the information sought, as the following discussion demonstrates.

The Supreme Court recently addressed the meaning of the phrase in *Powell* "that the inquiry may be relevant to the purpose" of the investigation. In *United States v. Arthur Young & Co.*, ___U.S.___, 104 S. Ct. 1495, 79 L.Ed.2d 826 (1984), the Supreme Court pointed out that 26 U.S.C. § 7602 authorizes the Secretary of the Treasury to "summon and 'examine any books, papers, records, or other data which *may be* relevant or material'

to a particular tax inquiry." 104 S. Ct. at 1500-01 (emphasis added and footnote omitted). The Supreme Court then stated:

> As the language of § 7602 clearly indicates, an IRS summons is not to be judged by the relevance standards used in deciding whether to admit evidence in federal court. Cf. Fed. Rule Evid. 401. The language "may be" reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until it is procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigative and enforcement functions of the IRS, see *United States v. Powell*, 379 U.S. 48, 57, 85 S. Ct. 248, 254, 13 L.Ed.2d 112 (1964); the Service therefore should not be required to establish that the documents it seeks are actually relevant in any technical, evidentiary sense.

104 S. Ct. at 1501 (emphasis in original). "Records that illuminate any aspect of the [taxpayer's] return . . . are therefore highly relevant to legitimate IRS inquiry." *Id.* at 1501-02.

In *Arthur Young*, the Supreme Court noted that the test for relevancy used by the Second Circuit had been widely accepted among the Courts of Appeals, including the Fifth Circuit. 104 S. Ct. 1501 n. 11. That standard is:

> [W]hether the summons seeks information which "might throw light upon the correctness of the taxpayer's return." *Foster v. United States*, 265 F.2d 183 (2d Cir. 1959), *cert. denied*, 360 U.S. 912, 79

> S.Ct. 1297, 3 L.Ed.2d 1261 (1959). [further citations omitted]. This definition has been narrowed further to require an indication of a "realistic expectation rather than an idle hope that something might be discovered." *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1968).

Wyatt, 637 F.2d at 300-301. *See also Linsteadt*, 724 F.2d at 482. While the Supreme Court in *Arthur Young* did not expressly adopt this test for relevancy, its use of the phrase "illuminate any aspect of the return" appears to this Court to be a favorable reference to that standard.[4]

[6] It is clear from the testimony at trial that the initial examination of Dr. Barrett's books indicated to the Government some type of discrepancy. Even Dr. Barrett's accountant testified that he attempted to help the IRS agent reconcile Dr. Barrett's books, but he "had difficulty with it." Record Vol. 7 at 29. The Government asserts on appeal that one of the things an agent would look for in such a case is unreported income. In other words, the agent would look for discrepancies between what patients actually paid and what Dr. Barrett recorded in his records. One way to find such discrepancies (and possibly the only way in some instances) would be to contact patients and compare the amounts their records show they paid to Dr. Barrett with what the doctor's records show he received from that patient. Surely such discrepancies would be potentially relevant to an ongoing investigation

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4. The Supreme Court perhaps suggests an even more expansive standard: any information that is even *potentially* relevant to an ongoing investigation may be obtained by an IRS summons. We need not decide in the instant case whether *Arthur Young* modifies the standard for relevance as applied in this Circuit because the Government meets the arguably more exacting standard currently in use in this Circuit.

and would "shed light on the correctness" of Dr. Barrett's return.

The hospitals and Dr. Barrett argue strenuously that the Government has no "realistic expectation" of obtaining useful infomation from the summonses because without a one hundred percent response from the patients the IRS will be unable to calculate Dr. Barrett's gross income. It appears to this Court that information obtained from these summonses can be used in more than one way. Contacting Dr. Barrett's patients treated at the hospitals is one way for the IRS to discover unreported income or patients' names that might not appear in Dr. Barrett's office records. Whether, in fact, such misstatements actually occurred remains to be seen, but the names and addresses of patients treated at the hospitals involved here are relevant to such an inquiry. This Court concludes that the Government has a "realistic expectation" rather than an "idle hope" of obtaining useful information. Thus, this Court concludes that the names and addresses of Dr. Barrett's patients treated at these hospitals are relevant to the IRS investigation of Dr. Barrett, and the IRS is not required to show a "specific benefit" from the information sought.

IV. POSSESSION OF THE REQUESTED INFORMATION

[7] As one of its reasons for denying enforcement of the instant summonses, the district court stated that the IRS had all the records they needed in Dr. Barrett's office.[5] This finding is relevant to the *Powell* requirement

5. The IRS contends that Dr. Barrett refuses to make this information available. Currently, the IRS has an action pending to enforce a summons seeking the taxpayer's records.

that "the information sought is not already within the Commissioner's possession." *Powell*, 379 U.S. at 57-58, 85 S. Ct. at 255. This "already possessed" exception to the enforcement of IRS summonses has been narrowly construed by this Court. *Linsteadt*, 724 F.2d at 483. Once the IRS has denied possession of the summoned information, as here by affidavit and testimony, then the burden of showing "at a minimum, 'actual possession of the information by the IRS' " shifts to the parties resisting the summonses. *Davis*, 636 F.2d at 1037 (quoting *United States v. Garrett*, 571 F.2d 1323, 1328 (5th Cir. 1978)).

In *Davis*, the Court construed the "already possessed" exception as follows:

> Read in context, we construe the "already possessed" principle enunciated by *Powell* as a gloss on [26 U.S.C.] § 7605(b)'s prohibition of "unnecessary" summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS.

636 F.2d at 1037.[6]

Dr. Barrett and the hospitals argue that the Government "already possessed" the information summonsed because IRS agents had reviewed Dr. Barrett's records prior to assigning the case to the Criminal Investigation Division. They cite *United States v. Pritchard*, 438 F.2d

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6. 26 U.S.C. § 7605(b) provides:
No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

969 (5th Cir. 1971), for the proposition that once the IRS has examined the taxpayer's files, the information in those files is in the Government's possession. The argument is simple: once the Government has seen the documents, the Government "possesses" the documents.

[8] That proposition does not state the law in this Circuit. In *Garrett,* this Court limited the import of *Pritchard*:

> *Pritchard* does not bar the enforcement of the summons issued to Garrett. In *Pritchard,* the IRS never made reference to whether the commissioner already possessed the information sought in the summons. Therefore, we agreed with the district court that the government had not shown the requisites for enforcement. *See Powell, supra.* The case at bar differs from *Pritchard,* because here the government alleged and set about to prove that it did not possess the information sought. To defeat the summons under these circumstances, Garrett had to show actual possession of the information by the IRS.

571 F.2d at 1328. We view the requirement in this Circuit to be that the taxpayer must show that the Government *actually possesses* the information summonsed, such that enforcement of a summons is "unnecessary" as that term is used in section 7605(b) of the Code.

Dr. Barrett and the hospitals have failed to meet their burden in the instant case. All parties agree that the IRS conducted an audit of Dr. Barrett, and at that time Dr. Barrett made all his records available to the IRS. The IRS asserts that Dr. Barrett's accounts could not be reconciled. Dr. Barrett's accountant also testified to that fact. The IRS now seeks to discover why the accounts

do not reconcile by contacting patients, perhaps to add the total amounts paid to the doctor to arrive at total income, as Dr. Barrett suggests, or perhaps, as the Government asserts, to find patients not recorded or sums not recorded in Dr. Barrett's records. As to any patients' names and addresses not appearing in Dr. Barrett's records, the IRS clearly is not in actual possession of that information. As to names and addresses that appeared in Dr. Barrett's files, the IRS agents testified that only some surnames and no addresses were copied by the IRS auditors. Thus, those names and addresses are not actually in the IRS's possession.

As the Seventh Circuit has stated:

> A second and even more compelling reason for reaching this conclusion follows from the fact that the case had been referred to Special Agent Shields for further investigation. The nature of Special Agent Shields' tax fraud audit was very much different in both approach and extent from the routine, "quality audit" made by Agent Heiting. In no manner could Agent Heiting's perusal of taxpayer's books for his routine audit fulfill Special Agent Shields' investigative needs. Therefore the government was not already in possession of the documents sought in the summons.

United States v. Lenon, 579 F.2d 420, 422 (7th Cir. 1978) (citations omitted).

[9, 10] Thus, this Court concludes that a mere showing by the taxpayer that the IRS has previously examined the taxpayer's own records is not sufficient to show either that the IRS *possesses* that information or that it *possesses* information in the custody of parties other than the taxpayer. We conclude that the IRS is not already in

possession of the summonsed information in the instant appeal; consequently, the enforcement of these summonses is not "unnecessary."[7]

V. ADMINISTRATIVE PROCEDURES

Powell requires that the IRS must have followed "the administrative steps required by the Code." *Powell*, 379 U.S. at 58, 85 S. Ct. at 255. Dr. Barrett asserts that the required administrative steps were not followed in the instant case because these summonses are third party summonses according to 26 U.S.C. § 7609 and the IRS did not follow the administrative procedures specified in that section. 26 U.S.C. § 7609(a) requires that if a summons is served on a third party record keeper, and the summons requires production of records made or kept of the business transactions or affairs of another person, then notice of the summons must be given to the person so identified. At the time these summonses were issued, section 7609 gave to that person the right to intervene in any proceeding with respect to the enforcement of such a summons, and also gave the person entitled to notice the right to stay compliance of the summons if certain procedures were followed.

Dr. Barrett testified that he did not receive notice from the IRS in accordance with section 7609. Dr. Barrett

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7. The hospitals and doctor argue that this information could be obtained from sources other than Dr. Barrett's patients, such as Dr. Barrett's own records or his bank records. When information is obtainable from more than one source, the IRS has great discretion to choose the source it prefers. The test is not whether the IRS *might be* able to obtain the information from some other source, but whether the information is *presently* in the possession of the IRS. The hospitals' and doctor's arguments are relevant only to the questions of abuse of process and improper disclosures of return information, discussed *infra*.

here asserts that if the records sought by the summonses fall within the records described in section 7609, and if the hospitals fall within the definition of third party record keepers as defined in section 7609, then the IRS has failed to comply with the administrative steps required by the Code and, according to *Powell,* the summonses cannot be enforced.

[11] This Court disagrees with the implicit conclusion advanced by Dr. Barrett that a failure to comply with administrative steps *necessarily* bars enforcement of the summonses. This Court need not reach the issue of whether the instant summonses are third party summonses because this Court concludes that even assuming these summonses are third party summonses, Dr. Barrett can demonstrate no prejudice from lack of formal notice. Consequently, Dr. Barrett shows no reason why these summonses should not be enforced. There is no dispute that in the instant case Dr. Barrett had *actual* notice of the summonses, that Dr. Barrett was allowed to intervene in the proceeding which was brought for the purpose of enforcing the summonses, and that the information requested by these summonses has yet to be divulged to the IRS. Thus, Dr. Barrett obtained every benefit contemplated by section 7609.

We do not construe the provision in *Powell* that requires compliance with administrative steps to be as mechanistic as Dr. Barrett asserts. *Powell* itself was concerned with section 7605(b) of the Code which requires the Secretary or his delegate to notify the taxpayer in writing that a second examination within one year of the first examination is necessary for the IRS to complete its

work.[8] In *United States v. Schwartz,* 469 F.2d 977, 984 (5th Cir. 1972), this Court indicated that the notification required by section 7605(b) is not "a perfunctory letter-writing job." In order for a second examination to be conducted, a regional commissioner must make the decision. 469 F.2d at 984. Thus, the benefit received by the taxpayer under that provision is review of the taxpayer's investigation by a superior before a second audit occurs. *Powell* was concerned with assuring that the taxpayer received that benefit.

[12, 13] In the limited context of the instant case, we hold that where the taxpayer has received *every benefit* of the administrative steps required by the Code, a failure by the IRS to meet the technical niceties of the statute will not bar enforcement of the summons. We note that more often than not, the taxpayer will be prejudiced by a failure to follow the requisite administrative steps. This, however, is not one of those cases. Dr. Barrett has failed to show *any* prejudice that resulted from an alleged failure to follow the strictures of 26 U.S.C. § 7609. Thus, any alleged failure was harmless. See *United States v. Hamilton Federal Savings and Loan Association,* 566 F. Supp. 755, 758 (E.D. N.Y. 1983); *United States v. Kansas City Lutheran Home and Hospital Association,* 297 F.Supp. 239, 241 (W.D. Mo. 1969). *Cf. United States v. Payne,* 648 F.2d 361 (5th Cir.), *cert. denied,* 454 U.S. 1032, 102 S. Ct. 570, 70 L.Ed.2d 476 (1981); *United States v. Myslajek,* 568 F.2d 55 (8th Cir.), *cert. denied,* 438 U.S. 905, 98 S. Ct. 3123, 57 L.Ed.2d 1147 (1978) (service requirements of section 7603 of the Code may be waived). Accordingly, Dr. Barrett has failed to meet his burden on this issue.

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8. *See supra* note 6 at 13 for the text of 26 U.S.C. § 7605(b).

VI. LEGITIMATE PURPOSE

[14] *Powell* requires that the IRS must show "that the investigation will be conducted pursuant to a legitimate purpose." *Powell,* 379 U.S. at 57, 85 S. Ct. at 255. This Court concludes that the evidence supports the district court's finding that there was a legitimate basis for this investigation. The district court stated:

> I think the Internal Revenue Service Agents have satisfied me that they are diligent, they are convinced that there is some irregularity in [Dr. Barrett's] taxes. . . .
>
> I am convinced they believe they are on the trail of some tax fraud.

Record Vol. 5 at 3-4. That finding of legitimate purpose for the investigation by the district court is not clearly erroneous.

Dr. Barrett asserts that the Government lacks a legitimate purpose in the instant case. Dr. Barrett asserts that his case was transferred by the revenue agent conducting the audit to the Criminal Investigation Division as punishment for his refusal to voluntarily extend the statute of limitations a second time. Dr. Barrett also alleges that the revenue agent threatened Dr. Barrett's accountant with a jeopardy assessment in order to force Dr. Barrett to agree to a second extension. Dr. Barrett contends that these alleged facts demonstrate that the summonses were issued for purposes of harassment and to force settlement of a collateral dispute as forbidden in *Powell,* 379 U.S. at 58, 85 S. Ct. at 255, and *United States v. LaSalle National Bank,* 437 U.S. 298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978).

This Court disagrees that these allegations demonstrate that the investigation of Dr. Barrett is not being conducted pursuant to a legtimate purpose. As Dr. Barrett's counsel conceded at oral argument,[9] there is nothing necessarily wrong with an IRS revenue agent informing the taxpayer that the taxpayer's case will be transferred to the Criminal Investigation Division once the period for assessing taxes on the years in question has run. Nor is there anything inherently wrong with informing the taxpayer's accountant that a jeopardy assessment might follow a failure to reconcile the taxpayer's records. *See Chamberlain v. Kurtz,* 589 F.2d 827, 835 (5th Cir.), *cert. denied,* 444 U.S. 842, 100 S. Ct. 82, 62 L.Ed.2d 54 (1979).

The real issue presented is not whether the taxpayer perceived the agent's actions as threats, but whether there is a legitimate purpose for the investigation. This Court notes that the testimony revealed that the IRS began its audit as a result of a tip, and that their initial audit demonstrated a problem reconciling Dr. Barrett's accounts. A legitimate concern on the part of the IRS was raised that Dr. Barrett was not reporting his taxes and thus, there was a legitimate purpose for this investigation. That legitimacy was not lost merely because the agent involved referred the case to the Criminal Investigation Division to avoid the effects of the expiration of the statute of limitations, *Chamberlain,* 589 F.2d at 835, or

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9. The following discussion occurred at oral argument:
Counsel: And it is very illegal to threaten a taxpayer with a referral to the Criminal Investigation Division unless he voluntarily extends . . .
Question to Counsel: But it certainly is not illegal to say if we don't get this, we're going to have to file, we're going to have to file a jeopardy assessment.
Counsel: No, Your Honor.

that the agent notified the taxpayer's accountant that a jeopardy assessment might follow.

[15] Dr. Barrett cites allegedly improper disclosures of taxpayer return information in violation of 26 U.S.C. § 7213 as further evidence that the IRS lacked a legitimate purpose for its investigation. This argument does not require us to find that the summonses involved here should not be enforced. As Dr. Barrett recognizes, any alleged improper disclosures are relevant to this case only to the extent that they demonstrate either an abuse of process (discussed *infra*) or a lack of legitimate purpose. As discussed shortly, we conclude that any disclosures, if there were improper disclosures, fail to demonstrate either bad faith on the part of the IRS or improper purpose for this investigation.

26 U.S.C. § 7213 provides that it is unlawful for any officer or employee of the United States to wilfully disclose to any person, except as authorized by the Internal Revenue Code, returns or return information. Such disclosure is a felony, and the statute requires that any officer or employee of the United States shall be discharged from employment upon conviction for such an offense.[10] 26 U.S.C. § 7217 previously authorized and

10. 26 U.S.C. § 7213 states:

(a)(1) It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

§ 7431 presently authorizes a civil action against the United States for any such disclosures of returns or return information by an officer or employee of the United States.[11]

"Return information" is defined in 26 U.S.C. § 6103 as follows:

> (b)(2) The term "return information" means—
>
> (A) *A taxpayer's identity*, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, *whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return* . . . (emphasis added).

Dr. Barrett argues that the previous mailing improperly disclosed patients' names and that he was subject to a criminal investigation. He urges that disclosure of such information violates 26 U.S.C. § 7213. Dr. Barrett asserts that these summonses should not be enforced because the Government concedes it intends to conduct a similar mass mailing to those patients whose names and addresses are obtained as a result of the enforcement of these summonses.

The Government contends, in opposition to Dr. Barrett's arguments, that disclosure of that information was authorized under section 6103(k)(6) which provides:

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11. Dr. Barrett has filed a civil action against the United States for alleged unlawful disclosures made by Agent Hanson in the Government's previous mass mailing to about 350 of Dr. Barrett's patients. The mailing stated that Dr. Barrett was under criminal investigation.

> (b) *An internal revenue officer* or employee *may*, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, *disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title.* Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

The Government argues that disclosing the patients' names and the information that Dr. Barrett was under criminal investigation was necessary to obtain information not otherwise reasonably available, i.e., evidence of discrepancies between actual payments made by patients to Dr. Barrett and the sums reflected in Dr. Barrett's books and records.

This Court declines to determine whether any improper disclosures occurred or whether disclosure by the IRS was necessary as defined in section 6103(k)(6). That is the very issue in Dr. Barrett's civil action against the IRS. Our focus here is to determine whether such a disclosure would demonstrate a lack of legitimate purpose for the investigation in *this* case. We conclude that even if the IRS unlawfully disclosed either patient names or that Dr. Barrett was under criminal investigation, that disclosure does not demonstrate lack of a legitimate purpose for the investigation in this case. First, Agent Hanson testified that the form letter which was sent, which allegedly disclosed this information, was a form letter regularly used by the IRS. Thus, this allegedly improper letter

did not cause Dr. Barrett to be treated differently from other taxpayers in the same situation as Dr. Barrett. Therefore, is presents no evidence of bad faith or lack of legitimate purpose in *this* case. Second, section 7213 does not provide that a summons should not be enforced if this section is violated. Rather, it creates criminal sanctions. Section 7217 created and section 7431 now creates a civil action for damages against the United States for such unlawful disclosures. Consequently, we conclude that Dr. Barrett's remedy in this case lies in his civil action against the United States and not in barring enforcement of the summonses.

[16] Moreover, we note that if the district court on remand determines that improper disclosures were indeed made in the prior mailings, enforcement of the summonses may be conditioned on an IRS agreement to cease such improper disclosures. *See, e.g., Dunn v. Ross,* 356 F.2d 664 (5th Cir. 1966). This Court holds in this appeal that a decision to completely deny enforcement of the instant summonses in their entirety was not the proper remedy for any alleged unlawful disclosures that occurred in the past. The IRS is entitled to information the hospitals possess relevant to the investigation of Dr. Barrett, but the district court may require the IRS to abide by the disclosure provisions of the Internal Revenue Code before it enforces the summonses.

This Court does not hold that unlawful disclosures of returns or return information by the IRS can *never* be sufficient evidence of lack of a legitimate purpose for the investigation such that IRS summonses should not be enforced. Rather, this Court holds that in *this* case, even accepting as true that improper disclosures oc-

curred, any alleged improper disclosures do not rise to the level necessary to demonstrate bad faith in the issuance of the summonses or lack of a legitimate purpose for the investigation. As this Court has noted, the district court expressly found that the IRS agents in this case were acting in good faith and that finding is not clearly erroneous.

VII. ABUSE OF PROCESS

The district court refused to enforce the summonses in the instant case because it found that enforcement would constitute an abuse of process. The district court stated:

> But I will say that the Internal Revenue Service, in the use of the names that it obtained previously, has abused those names by sending out those blanket letters to the spouses of some of the patients. That is a violation of the statutes of the United States. That is divulging confidential information. That is an abuse of prior process, and it forces me to conclude that the Internal Revenue Service would do the same thing again and that would be an abuse of this court's process. And I cannot permit it.

Record Vol. 5 at 4-5.

In *Powell*, the Supreme Court stated:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. . . . The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.

379 U.S. at 58, 85 S. Ct. at 255 (footnote omitted).

In *Wyatt,* this Court summarized the situations where this Court has found an abuse of process:

> Such an abuse would occur if the [summons'] purpose was solely for harassment or to put pressure on the taxpayer to settle a collateral dispute, or solely for criminal prosecution, or where enforcement would contravene the attorney-client privilege, or the privilege against self-incrimination, or for any other purpose other than one of "good faith" on the part of the IRS concerning that particular investigation of civil liability.

Wyatt, 637 F.2d at 301 (citations omitted).

The Government asserts that the district court improperly based its ruling in the instant case on the privacy rights of Dr. Barrett's patients. *See In re Albert Lindley Lee Memorial Hospital,* 209 F.2d 122 (2d Cir. 1953), *cert. denied,* 347 U.S. 960, 74 S. Ct. 709, 98 L.Ed. 1104 (1954). This Court disagrees. The district court expressly noted that its decision was not based on the patients' privacy interests. Rather, the district court found an abuse of process because, allegedly, the IRS in its previous mass mailing had improperly contacted the spouses of patients, and the IRS intended to send out a similar mass mailing to the patients whose names and addresses would be obtained by these summonses. Thus, the district court did not reach the issue of patient privacy; neither does this Court.[12]

[17] The district court found as a matter of fact that the mailings of the IRS had improperly reached patients' spouses. That fact finding is reviewable under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *See Sun*

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12. Whether concerns for patient privacy bar enforcement of these summonses is an issue that should first be addressed by the district court upon remand. *See, e.g., United States v. Humedco Enterprises, Inc.,* 512 F.Supp. 1302, 1307-08 (E.D. Pa. 1981).

First National Bank, 510 F.2d at 1109. We conclude that the district court's finding was clearly erroneous. At oral argument, counsel conceded that only one such instance could be demonstrated. That one instance is insufficient to support the factual conclusion that there was widespread abuse. This Court is left with the "definite and firm conviction that a mistake has been committed," *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 102 S. Ct. 2182, 2189, 72 L.Ed.2d 606 (1982), and the district court's conclusion that *spouses* had been contacted by the IRS cannot stand. We further hold that a single instance of a spouse being inadvertently contacted in the past does not meet Dr. Barrett's or the hospitals' burden of showing that an abuse of process would occur from enforcement of the present summonses.

The IRS mass mailings which were directed to Dr. Barrett's patients, however, disclosed that Dr. Barrett was under criminal investigation by the IRS. As discussed, *supra*, this information may be "return information." If indeed it is, disclosure of that information would be unlawful under section 7213 unless the Government met its burden under section 6103(k)(6). We note that it may well be an abuse of process to allow enforcement of summonses when the IRS concedes it will continue to unlawfully disclose taxpayer return information. On remand, the district court must determine (1) whether the described information falls under the definition of returns or return information in section 6103, and (2) if so, the district court must further determine whether the IRS is authorized to disclose the information under section 6103(k)(6). *See, e.g., Kemlon Products and Development Co. v. United States*, 638 F.2d 1315, 1323 (5th Cir.), *cert. denied*, 454 U.S. 863, 102 S. Ct. 320, 70 L.Ed.2d 162 (1981). The district court's concern re-

garding an abuse of process is reached only if it concludes that disclosure by the IRS is not authorized. This Court reiterates that even if the past disclosure was improper, the district court has discretion to condition enforcement of the summonses by requiring that the IRS agree to desist from further unlawful disclosures. A complete refusal to enforce the instant summonses in their entirety, however, fails to recognize the IRS's right to seek to obtain relevant information concerning Dr. Barrett's tax status. Under the present record, the hospitals and Dr. Barrett have not met their burden to demonstrate that enforcement of these summonses would abuse the court's process.

VIII. CONCLUSION

While this Court recognizes that the district court has broad discretion to protect the taxpayer, see *Dunn v. Ross*, 356 F.2d 664 (5th Cir. 1966), this Court nevertheless concludes that the district court should not have denied enforcement of the instant summonses for the reasons it stated. We hold that the Government met its initial burden under *Powell*, and that the hospitals and Dr. Barrett failed to demonstrate that the *Powell* criteria were not met or that enforcement of the summonses would constitute an abuse of process for the reasons stated by the district court. The order of the district court is vacated and the case is remanded to the district court for proceedings consistent with this opinion.[13]

VACATED AND REMANDED.

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13. Methodist Hospital challenges the burdensomeness of the enforcement of the instant summonses because compliance would allegedly require the hospital to manually read approximately 415,000 patient files. Whatever the merits of this argument, the district court did not address it below, and thus the issue is left for an initial determination by the district court on remand.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H-83-205

UNITED STATES OF AMERICA AND
INTERNAL REVENUE SERVICE
SPECIAL AGENT MICHAEL O. HANSON

v.

TEXAS HEART INSTITUTE AND
GREGG C. WADDILL, ASSOCIATE
ADMINISTRATOR AND COUNSEL

BEFORE: THE HONORABLE NORMAN W. BLACK
UNITED STATES DISTRICT COURT

HOUSTON, TEXAS

JULY 26, 1985

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

APPEARANCES:

For The Government:

Ms. Nancy Pecht
Mr. Javier Aguilar

For The Defendant:

Mr. Jasper Taylor

For The Intervenor:

Mr. Edward Urquhart
Ms. Sylvia Hassell

For Methodist Hospital:

Mr. Bruce Heygi
Ms. Joy Scruggs

THE COURT: All right. I am interested in what happened in the prior proceeding, primarily as it bears upon what we can expect if the subpoena is enforced in this proceeding. I am concerned that the Internal Revenue Service sent a form letter to patients before they moved to compel the taxpayer to reveal his records. And I'm also concerned with the broadcasting of those letters for another reason. It is well-established in the medical field that a substantial number of fees are not paid by the patient, they are paid by insurance companies. Asking the patient how much they paid the doctor is totally pointless. They may know they paid 20 percent or they may have paid nothing. They wouldn't even know for certain whether their insurance company had paid the doctor. That's the great single attribute of the medical profession today, is third party payments.

I think it was irresponsible on the part of the Internal Revenue Service to use the letter of inquiry prior to other methods. Obviously if they were inquiring about cash payments by people who didn't want to make insurance claims to conceal the fact that they had had this surgery, there should have been some subtlety in the use of that form letter.

There also should have been some procedure used by the Internal Revenue Service to whatever extent possible

to keep those letters out of the hands of anyone but the patient.

On the other hand, I think the government has shown that under the present posture of the facts. That is the Internal Revenue Service now has what Dr. Barrett purports as all of his records. I will order that the summons be enforced as to St. Luke's and Methodist.

The list, as now stipulated by the government, of patients' addresses and dates—I believe that's the limitation, isn't it, Ms. Pecht?

MS. PECHT: What we are seeking from the hospitals? Yes. I believe so. Yes, sir.

MR. HEYGI: Yes, sir.

THE COURT: Patients' addresses and dates as shown in your patient registry will be turned over to the Internal Revenue. The Internal Revenue is, I am told, waiving the request that you search all of your records, your patient files, to determine whether they were Dr. Barrett's admissions.

I can only enjoin the Internal Revenue Service to be much more careful in observing 6103(k)(6). I will not do the ridiculous and enjoin them to obey the law. They are already enjoined to obey the law. I will only suggest that I think this case calls for a very, very careful consideration in the use of the names that they will have furnished to them.

It seems to me the better process would be to compare the ledger sheets with the lists and only to attempt to contact those patients for whom there is some cause to believe that there may be a cash payment made and not recorded in the doctor's books.

However, if the Internal Revenue Service chooses to violate the law, somebody will have to take the penalty for it. Therefore, I cannot do anymore than express concern for patient privacy. I don't think patient privacy in this case bars the enforcement of the summons. I think violation of patient privacy may very well give rise to a cause of action under 6107(k)(6). I'm sorry. 6103 (k)(6). But I don't think it bars the enforcement of this summons. I don't think I am required to give an advisory opinion as to the letter proposed by Mr. Hanson, Government's Exhibit 2, but it seems to me that that is the kind of letter that would be expected to be used in this kind of case in the selected manner that the Internal Revenue Service ought to consider it.

The information in the original mailing disclosing that Dr. Barrett was under criminal investigation concerning his tax problems was clearly the disclosure of return information. I cannot say, however, it was such disclosure as to preclude the enforcement of the summons under the present facts.

I therefore, under the statement of law of the Fifth Circuit in United States v. Texas Heart Institute, do not reach the question of whether there was an abuse of process.

Ms. Pecht, if you would like to prepare a proposed form of order and submit it to counsel, I'll be glad do it in writing, but as far as I'm concerned, these are my findings and conclusions on the record.

Bernard M. BARRETT, Jr., M.D., and
Plastic & Reconstructive Surgeons,
P.A., Plaintiffs-Appellants,

v.

UNITED STATES of America and
Internal Revenue Service,
Defendants-Appellees.

No. 85-2665.

United States Court of Appeals,
Fifth Circuit.

July 28, 1986.

Physician brought action for unlawful disclosures of tax return information during a civil and criminal investigation. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., entered summary judgment for the United States, and physician appealed. The Court of Appeals, E. Grady Jolly, J., held that evidence presented by physician created genuine issues of material fact as to whether it was necessary for IRS to contact some or all of physician's patients, whether it was necessary to disclose each of the items of return information included in letter mailed to patients, and whether at least some of the information IRS sought from patients was otherwise reasonably available from bank records, precluding summary judgment in favor of Government.

Reversed and remanded.

Edward D. Urquhart, Urquhart & Hassell, Silvia E. Hassell, Charles J. Escher, Houston, Tex., for plaintiffs-appellants.

Thomas R. Lamons, Henry K. Oncken, U.S. Atty., Houston, Tex., James R. Gough, Asst. U.S. Atty., Stuart D. Gibson, Tax Div., U.S. Dept. of Justice, Appellate Section, Roger M. Olsen, Acting Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Sec., Richard Perkins, Washington, D.C., for defendants-appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before WILLIAMS, JOLLY and HIGGINBOTHAM, Circuit Judges.

OPINION

E. GRADY JOLLY, Circuit Judge:

Dr. Barrett seeks damages against the United States under 26 U.S.C. § 7431 for unlawful disclosures of tax return information during a civil and criminal investigation. The Internal Revenue Service mailed letters to Dr. Barrett's patients that were designed to determine whether cash payments had been made to him. Dr. Barrett argues that the letters were unnecessary to the IRS's investigation, and therefore improperly disclosed the fact that he was under investigation, in violation of 26 U.S.C. §§ 7431, 6103. The district court granted summary judgment for the United States. We reverse and hold that Dr. Barrett's evidence raises a genuine issue of material fact, making summary judgment inappropriate.

I

Dr. Barrett's saga has been told before. *United States v. Barrett,* [I] 787 F.2d 958 (5th Cir. 1986),[1] *United States v. Texas Heart Institute,* 755 F.2d 469 (5th Cir. 1985). The IRS began auditing Dr. Barrett's tax returns on July 27, 1979. It is still investigating him. The investigation began as a civil audit, but was later transferred to the criminal investigation division. The IRS gives two reasons for transferring the case to the criminal division: its audit showed a $100,000 difference between Dr. Barrett's books and his bank records, and a confidential informant furnished incriminating information to the IRS about Dr. Barrett's tax returns. Dr. Barrett maintains that the reason for the transfer was IRS pique, stemming from his refusal to voluntarily extend the civil statute of limitations.

The IRS's investigative efforts are summarized in *Texas Heart* and *Barrett I.* The IRS sent summonses to Dr. Barrett and all the hospitals in which he practiced. The hospital summonses were designed to obtain the names of Dr. Barrett's patients, so that the IRS could compare the patients' payment information with Dr. Barrett's to determine whether he was failing to report cash payments of fees he received.

Some of the hospitals cooperated voluntarily, and provided the names. Others resisted, and the IRS filed the petition in *Texas Heart* to enforce the summons. In *Texas Heart,* we reversed the district court's decision not to enforce the summonses against the hospitals, and remanded to the district court. On remand, the district

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1. The mandate was held in *Barrett I* on April 30, 1986, and has not yet issued.

court enforced the summonses against the hospitals, but expressed some concern that the "better process would be to compare the [doctor's] ledger sheets with the lists [of patients] and only attempt to contact those patients for whom there is some cause to believe that there may be a cash payment made and not recorded in the doctor's books."

In the summons addressed to Dr. Barrett himself, the IRS sought his patient records. The district court enforced the summons, and this court affirmed. *Barrett I,* 787 F.2d at 958.

In the meantime, in March 1983, the IRS through Agent Hanson, sent letters to between 350 and 400 of Barrett's patients whose names were obtained from the cooperative hospitals. Hanson did not use standard IRS letter forms. Instead, he sent specially prepared letters that informed each patient that Dr. Barrett was under investigation by the Criminal Investigation Division of the IRS, stated the years under investigation, and requested documents concerning the patients' payments to Dr. Barrett and insurance claim information. Only eighty-one patients responded to the letters. At the time the letters were sent, the IRS had free access to Dr. Barrett's bank records, which contained much of the same information.

In November 1983, Dr. Barrett filed an action for damages under 26 U.S.C. § 7431 against the United States and the IRS. The district court held that, although the disclosures in the letters undoubtedly constituted return information, the IRS was authorized to disclose this information because of its strong interest in choosing the source of information it sought, and because the bank

records were not a source of information "otherwise reasonably available" pursuant to section 6103(k)(6). Dr. Barrett appeals.

II

Dr. Barrett argues that the district court failed to recognize that 26 U.S.C. § 6103(k)(6) restricts the IRS to information not "otherwise reasonably available," and that a significant part of the information the IRS sought was reasonably available from the bank records. He argues that the affidavits he presented, describing the available bank records and normal investigative procedures, raise genuine issues of material fact concerning the necessity of sending the letters to all of Dr. Barrett's patients. Dr. Barrett also argues that, even if the letters were necessary, the IRS was not justified in telling Dr. Barrett's patients that he was under criminal investigation.

Dr. Barrett also argues the district court unduly restricted discovery by denying him the opportunity to take the depositions of the IRS's alleged confidential informants, and by denying him access to a list of the patients to whom Hanson mailed the letters. Finally, Dr. Barrett argues that the district court erred in not allowing him to amend his complaint and add one of the alleged confidential informants as a defendant.

The United States maintains that IRS regulations, issued pursuant to 26 U.S.C. § 6103(k)(6), authorize the disclosures in this case. According to the United States, when the IRS collects information during an investigation, the regulations allow the disclosure of a taxpayer's identity and the nature of an agent's official duties. Moreover, the United States argues that an agent conducting

a legitimate civil or criminal investigation has wide discretion to determine the manner in which he will conduct that investigation, and the courts must accord great weight to the agent's determinations. The United States argues that the agents acted under a good-faith interpretation of section 6103, and, as judged by the standard of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982), the United States cannot be held liable. 26 U.S.C. § 7431(b).

Finally, the United States argues that the district court properly denied leave to amend the complaint to add the confidential informant as a defendant because any disclosures by the informant were unrelated to the disclosures at issue here. The United States thus argues that Dr. Barrett's proposed discovery from the informants is irrellevant, and would impede the IRS criminal investigation.

III

The primary issue we face on appeal is whether the disclosures in the letters to Dr. Barrett's patients were necessary to obtain information that was not otherwise reasonably available, and in particular, whether summary judgment should have been granted on this issue.

IV

Fed. R. Civ. P. 56(c) states the standard for review of motions for summary judgment; in pertinent part the rule reads:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

> affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .

The moving party has the burden of establishing that there is no genuine issue of fact, and the party opposing the motion should be given the benefit of every reasonable inference in his favor. *Harrison v. Byrd,* 765 F.2d 501, 504 (5th Cir. 1985).

Accordingly, on appeal we view all materials and evidence in the light most favorable to Dr. Barrett, to determine if there is any issue of material fact, and whether judgment was properly granted for the United States.

A.

Section 6103(a) states the general rule that returns and return information shall be confidential, and section 6103 (b) defines the terms "return" and "return information" broadly, to include, *inter alia,* the taxpayer's identity, the nature, source and amount of his income, and whether his return is, was or may be subject to examination or other investigation. Section 6103(k)(6) provides an exception to the general rule of confidentiality permitting disclosures in limited circumstances: the disclosure must be "necessary" to obtain the information the IRS seeks, and the information must not be "otherwise reasonably available."[2] 26 U.S.C. § 6103(k)(6). Section 6103(k)

2. Section 6103(k)(6) provides:
An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount

(6) also allows the Secretary of the Treasury to limit the situations and conditions under which disclosures can be made.[3]

The district court found as a fact that Hanson disclosed return information. The district court found, however, that the disclosures fell within the exception provided by section 6103(k)(6), because the information Hanson sought was "not otherwise reasonably available."

We turn then to consider whether the disclosures were necessary, and whether the information sought was otherwise reasonably available. In the case before us, these two questions are interdependent, and we therefore consider them together. We have thus reviewed the record, and have concluded that Dr. Barrett has raised genuine issues of material fact about whether the section 6103 (k)(6) exception is a bar to liability here.

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to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

3. The IRS has argued that the following regulation, quoted in relevant part, authorized the disclosures in the letters:

> In connection with the performance of official duties relating to any . . . civil or criminal investigation, . . . an officer or employee of the Internal Revenue Service . . . is authorized to disclose taxpayer identity information (as defined in section 6103(b)(6)), *the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties* in order to obtain necessary information relating to performance of such official duties. . . . (Emphasis added.)

Treas. Reg. § 301.6103(k)(6)-1(a). This regulation obviously does not create additional exceptions that are not provided in the statute or issue authorizations that conflict with the statute. Thus, the regulation can only be interpreted to authorize disclosures that are "necessary" to obtain information "not otherwise reasonably available" in a given case.

Dr. Barrett provided an affidavit from a former IRS agent who stated that it was not standard IRS procedure to contact first the customers of a service business, such as a medical practice, when attempting to locate unreported income. Instead, the former agent stated that the first step was usually to obtain copies of all deposit items, and that this procedure eliminated the necessity of contacting the customers in most instances. Dr. Barrett also presented an affidavit from the vice president of a bank, which stated that all deposit information concerning Dr. Barrett's account, including 900 to 1,000 patient checks per year for a five-year period, was at all times available to the IRS agent. On the basis of this uncontested affidavit, we can take it as established, for summary judgment purposes, that the bank records were reasonably available.

These affidavits, if accepted as true, create a genuine issue of material fact as to whether it was necessary for Hanson to disclose return information to each, or any, of Dr. Barrett's patients; some disclosures, perhaps all, might have been avoided by reviewing and analyzing the bank records. On the other hand, this possibility may not prove true; we do not know. Whether it is true or untrue is a factual dispute making the grant of summary judgment inappropriate.

Hanson's affidavit, which denies that the information he sought could have been obtained from bank records, only contradicts, in conclusory terms, the former agent's affidavit, and does not eliminate the material issue of fact raised. Indeed, Hanson's affidavit itself may be read to say that some of these disclosures might have been avoided if he had carefully analyzed the bank records: Hanson stated that it was necessary for him to go to the

patients, rather than bank records, to determine whether payments were made in cash, because "the basis of the investigation was that payments made in cash by patients were not being deposited by Barrett." Hanson affidavit, para. 9. To the extent, therefore, that a patient's payments were deposited, they were not unreported cash payments. Thus, if Hanson had examined the patients' checks in the bank records and other deposit information, he might or might not have eliminated disclosures to many of the 350 to 400 patients. Again, a dispute of fact is raised that the district court should properly resolve.

[1] We therefore find it necessary to remand to allow the district court to consider the evidence "otherwise reasonably available," and to consider whether, in the light of the evidence available, it was necessary to send the letters. We note that the letters ask for cancelled checks, insurance information, and receipts for cash payments. Of course, there is no evidence that insurance information would have been available from the bank records. This information might or might not have been reasonably available from another source that would have made unnecessary disclosure to between 350 to 400 persons. We leave the question whether such information was otherwise reasonably available for the district court's determination on remand. Similarly, there is no evidence that proof of cash payments was reasonably available from sources other than the taxpayer. In some instances, however, the disclosures may not have been necessary once all the information available to the IRS was reviewed and analyzed. We leave the resolution of this question to the district court, based on its analysis of the evidence and the arguments of the parties.[4]

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4. The district court, without analyzing the information available to the IRS, summarily found that no material issues of fact were in

Even if, however, the district court should determine that any or all of these three items were not reasonably available from another source, the district court will still have to determine whether it was necessary to disclose the return information contained in the letters to Dr. Barrett's patients to obtain the requested items of information. Although disclosure of the taxpayer's name was clearly necessary if the letter had to be sent at all, a genuine issue of material fact has been raised as to whether disclosure of the return information that the taxpayer was under investigation, particularly criminal investigation, was "necessary." We recognize that this may be a mixed question of law and fact; that is, the district court must interpret section 6103(k)(6) and the relevant IRS regulations in the light of the facts developed. Nevertheless, to the extent that a factual dispute is presented, it will have to be resolved by the district court on remand.

We should make clear that our holding today is not an attempt to provide a set of instructions that the IRS must follow to conduct an investigation. We emphasize that in a section 7431 action the court does *not* inquire whether the information sought is necessary: the questions

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dispute. It erroneously concluded that, because the IRS has great discretion to choose sources of information when it does not already possess the information and when the method it chooses does not abuse taxpayer rights in a summons enforcement proceeding, the IRS's choice of one source makes others not reasonably available. This conclusion incorrectly borrows from the summons enforcement context. *Texas Heart Institute*, 755 F.2d at 477, n. 7. The *Texas Heart* court specifically concluded that a summons enforcement proceeding and a section 7431 action presented different issues, holding that, even if Dr. Barrett could demonstrate section 7431 violations, the summons could still be enforced. *Texas Heart* held that Dr. Barrett's proper remedy for the alleged illegal disclosures lay in this very action. *Id.* at 480.

are whether the *disclosures* are "necessary" to obtain the information sought and whether the information sought is "otherwise reasonably available." Stated differently, in a section 7431 action, we do not question the right, wisdom, or necessity of a particular IRS investigation. We do question, however, the means of investigation, but only to the limited extent consistent with section 7431.

[2] In conclusion, we hold that the evidence presented by Dr. Barrett creates a genuine issue of material fact whether it was necessary to contact some or all of Dr. Barrett's patients, whether it was necessary to disclose each of the items of return information included in the letter mailed to Dr. Barrett's patients, and whether at least some of the information the IRS sought from the patients was otherwise reasonably available from bank records.[5]

B.

Dr. Barrett also argues that the district court should have granted his motion to amend his complaint and to add an alleged confidential informant as a defendant. He points to section 7431(a)(2) that specifically provides for a civil action for damages against persons who are not United States employees. The district court denied the motion without comment. We therefore cannot tell whether it ruled as a matter of law or whether it exercised its judgment as a matter of discretion. Furthermore, its reasons for denying the amendment may now be moot.[6]

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5. Since the district court did not reach the issue of a possible good-faith interpretation of section 6103, we leave that issue to the district court on remand. *See Huckaby v. United States*, 794 F.2d 1041 (5th Cir. 1986).

6. We note also that neither party raised before the district court or before us the fact that the motion failed to meet a deadline in a

[3] Because we remand this case to the district court, it appears that the amendment should be allowed under the liberal standard of Federal Rule of Civil Procedure 15. *Partridge v. Two Unknown Police Officers,* 791 F.2d 1182, 1188 (5th Cir. 1986). Of course, the district court can still exercise its discretion to deny the motion. Today, we hold only that it was error to deny the amendment as matter of law.

V

This case is remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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pretrial order. The pretrial order required that new parties be joined by October 29, 1984. Dr. Barrett did not request the alleged confidential informant be joined until January 25, 1985. Now that we have remanded for a trial, the timeliness of the amendment may be moot. The district court will have an opportunity to review all its earlier rulings in the light of our opinion today.

UNITED STATES CONSTITUTION

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTERNAL REVENUE CODE

The subsections of I.R.C. § 6103 relevant to this Petition are 6103(a), 6103(b), and 6103(k) are set forth below:

Sec. 6103. *Confidentiality and Disclosure of Returns and Return Information.*

[Sec. 6103(a)]

(a) GENERAL RULE.—Returns and return information shall be confidential and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection the term "officer or employee" includes a former officer or employee.

[Sec. 6103(b)]

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined

in section 6110(b)) which is not open to public inspection under section 6110.

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or pro-

posed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) STATE.—The term "State" means—

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, and

(B) for purposes of subsection (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality—

(i) with a population in excess of 2,000,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) TAXPAYER IDENTITY.—The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) CHIEF EXECUTIVE OFFICER.—The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

[Sec. 6103(k)]

(k) DISCLOSURE OF CERTAIN RETURNS AND RETURN INFORMATION FOR TAX ADMINISTRATION PURPOSES.—

(1) DISCLOSURE OF ACCEPTED OFFERS-IN-COMPROMISE.—Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

(2) DISCLOSURE OF AMOUNT OF OUTSTANDING LIEN.—If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to

such lien or intends to obtain a right in such property.

(3) DISCLOSURE OF RETURN INFORMATION TO CORRECT MISSTATEMENTS OF FACT.—The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.

(4) DISCLOSURE TO COMPETENT AUTHORITY UNDER TAX CONVENTION.—A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention or other convention relating to the exchange of tax information with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention.

(5) STATE AGENCIES REGULATING TAX RETURN PREPARERS.—Taxpayer identity information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only

upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be furnished. Information may be furnished and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such stiuations and under such conditions as the Secretary may prescribe by regulation.

[Sec. 7213]

Sec. 7213. *Unauthorized Disclosure of Information.*

[Sec. 7213(a)]

(a) RETURNS AND RETURN INFORMATION.—

(1) FEDERAL EMPLOYEES AND OTHER PERSONS.—It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any

such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) STATE AND OTHER EMPLOYEES.—It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i), (l)(6), (7), (8), (9), (10), or (11), or (m)(2) or (4) of section 6103. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) OTHER PERSONS.—It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in any manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of this paragraph shall be a

felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) SOLICITATION.—It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) SHAREHOLDERS.—It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

[Sec. 7213(b)]

(b) DISCLOSURE OF OPERATIONS OF MANUFACTURER OR PRODUCER.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties

shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

[Sec. 7213(c)]

(c) DISCLOSURES BY CERTAIN DELEGATES OF SECRETARY.—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

[Sec. 7213(d)]

(d) CROSS REFERENCES.—

(1) PENALTIES FOR DISCLOSURE OF INFORMATION BY PREPARERS OF RETURNS.—For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) PENALTIES FOR DISCLOSURE OF CONFIDENTIAL INFORMATION.—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

JURISDICTION OF DISTRICT COURTS

[Sec. 7402]

Sec. 7402. (a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) FOR DAMAGES TO UNITED STATES OFFICERS OR EMPLOYEES.—Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) [Repealed by P.L. 92-310]

(e) TO QUIET TITLE.—The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) GENERAL JURISDICTION.—

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of Title 28 of the United States Code.

[Sec. 7431]

Sec. 7431. *Civil Damages for Unauthorized Disclosure of Returns and Return Information.*

[Sec. 7431(a)]

(a) IN GENERAL.—

(1) DISCLOSURE BY EMPLOYEE OF UNITED STATES.—If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) DISCLOSURE BY A PERSON WHO IS NOT AN EMPLOYEE OF UNITED STATES.—If any person who is not an officer or employee of the United States know-

ingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

[Sec. 7431(b)]

(b) NO LIABILITY FOR GOOD FAITH BUT ERRONEOUS INTERPRETATION.—No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

[Sec. 7431(c)]

(c) DAMAGES.—In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

[Sec. 7431(d)]

(d) PERIOD FOR BRINGING ACTION.—Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

[Sec. 7431(e)]

(e) RETURN; RETURN INFORMATION.—For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

[Sec. 7431(f)]

(f) EXTENSION TO INFORMATION OBTAINED UNDER SECTION 3406.—For purposes of this section—

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

EXAMINATION OF BOOKS AND WITNESSES

[Sec. 7602]

Sec. 7602. (a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) PURPOSE MAY INCLUDE INQUIRY INTO OFFENSE.—The purposes for which the Secretary may take any ac-

tion described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) NO ADMINISTRATIVE SUMMONS WHEN THERE IS JUSTICE DEPARTMENT REFERRAL.—

(1) LIMITATION OF AUTHORITY.—No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) JUSTICE DEPARTMENT REFERRAL IN EFFECT.—For purposes of this subsection—

(A) IN GENERAL.—A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) TERMINATION.—A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) TAXABLE YEARS, ETC., TREATED SEPARATELY.—For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

ENFORCEMENT OF SUMMONS

[Sec. 7604]

Sec. 7604. (a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) CROSS REFERENCES.—

(1) AUTHORITY TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) PENALTIES.—

For penalties applicable to violation of section 6420(e)(2), 6421(f)(2), 6427(j)(2), or 7602, see section 7210.

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No. 87-1705

In the Supreme Court of the United States

OCTOBER TERM, 1988

BERNARD M. BARRETT, JR., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the en banc court (Pet. App. A3-A41) is reported at 837 F.2d 1341. The order granting rehearing en banc (Pet. App. A42-A43) is reported at 812 F.2d 936. The second panel opinion (Pet. App. A44-A56) is reported at 804 F.2d 1376. The earlier panel opinion (Pet. App. A57-A72), withdrawn upon the grant of panel rehearing, is reported at 787 F.2d 958. The district court's findings of fact and conclusions of law (Pet. App. A73-A78) and its memorandum and order denying reconsideration (Pet. App. A81-A83) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 24, 1988. The petition for a writ of certiorari was filed on April 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a doctor and the president of an incorporated medical practice. When an audit of petitioner's personal and corporate income tax returns revealed a $100,000 discrepancy between the amounts deposited into petitioner's bank accounts and the amounts of gross income shown on his tax returns, the Internal Revenue Service (IRS) transferred the case to its criminal division. Pet. App. A5. An informant advised the investigating special agent, respondent Hanson, that petitioner had not reported as income all of the payments received from his patients (*id.* at A120). Accordingly, Agent Hanson determined that it would be necessary to inquire of petitioner's patients the amount that each had paid for the medical services rendered. To that end, Agent Hanson issued administrative summonses to all of the hospitals at which petitioner practiced, and all but four of them provided the agent with a list of petitioner's patients. Agent Hanson mailed to each of those patients a form letter stating that petitioner was under investigation by the IRS Criminal Investigation Division and requesting information about the fees paid to him. *Id.* at A5.

The government petitioned for enforcement of the summonses issued to the four hospitals that had not supplied patient lists. The district court refused to enforce the summonses, objecting in part to the letters that had been sent to the patients whose identities had been divulged by the other hospitals. The court of appeals vacated and remanded. *United States* v. *Texas Heart Institute*, 755 F.2d 469 (5th Cir. 1985) (reprinted at Pet. App. A86-A113). It ordered the summonses enforced, holding, inter alia, that petitioner's assertion that the letters unlawfully divulged confidential information, in violation of 26 U.S.C. 6103, provided no basis for doubting the IRS's good faith in

issuing the summonses and therefore no basis for not enforcing them.[1] The court added, however, that if the district court determined on remand that unlawful disclosures had been made to the patients, the "enforcement of the summonses may be conditioned on an IRS agreement to cease such improper disclosures" (755 F.2d at 481).

2. This case concerns a summons that was issued by the IRS seeking records of petitioner's medical practice. When petitioner failed to comply with the summons, the IRS brought this enforcement action in the United States District Court for the Southern District of Texas. The district court enforced the summons unconditionally (Pet. App. A73-A78). Relying on *Texas Heart*, a panel of the court of appeals affirmed the enforcement of the summons (Pet. App. A44-A56), but ordered the case remanded to the district court with instructions "to consider whether enforcement of the IRS summons should be conditioned in order to protect [petitioner] against un-

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[1] 26 U.S.C. 6103(a) generally prohibits the IRS from disclosing tax "return information" except in the circumstances specifically permitted by that section. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. The statute then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties, including specified government agencies, congressional committees, and representatives of a taxpayer. See 26 U.S.C. 6103(c)-(o). The information that Barrett was under investigation falls within the definition of "return information" that is protected by Section 6103. The government's position was that the disclosure in the letters was authorized by 26 U.S.C. 6103(k)(6), which permits the disclosure of return information "to the extent * * * necessary in obtaining information" in connection with an audit or other investigation related to the enforcement of the revenue laws.

necessary disclosure of the fact that he is under criminal investigation" (*id.* at A50).[2]

The court of appeals granted the government's petition for rehearing en banc and held that the district court was correct in refusing to condition enforcement of the summons (Pet. App. A3-A41). The en banc court unequivocally held (*id.* at A25): "[I]n a summons enforcement proceeding the only issue that the district court can decide is whether to enforce the summons. The court cannot conditionally enforce that order." The court explained (*id.* at A22):

> There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the IRS.

Accordingly, the court explicitly overruled *Texas Heart* (Pet. App. A25), along with an earlier case, *Dunn* v. *Ross*, 356 F.2d 664 (5th Cir. 1966), to the extent that case could

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[2] The panel had originally voted 2-1 to affirm the district court's unconditional enforcement order in full (Pet. App. A57-A72). The panel subsequently granted petitioner's rehearing petition, however, and concluded that it was bound by *Texas Heart* to instruct the district court to consider the issuance of a conditional enforcement order. Judges Reavley and Hill filed a concurring opinion stating their view that *Texas Heart* was wrongly decided (Pet. App. A50-A53).

be read "to endorse the district court's ability to conditionally enforce a summons" (Pet. App. A23). Four judges dissented, arguing that *Texas Heart* had been correctly decided (Pet. App. A26-A40). Two other judges did not reach the merits, dissenting on the ground that the case was moot because the documents in question had been turned over to the IRS (*id.* at A40-A41).[3]

DISCUSSION

While we believe that the decision below is correct, we agree with petitioner (see Pet. 25-28) that the decision below creates a clear conflict in the circuits. The Ninth Circuit, in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525-1526 (1986), and *United States* v. *Zolin*, 809 F.2d 1411, 1416-1417, reh'g en banc granted, 832 F.2d 127 (1987), order granting reh'g vacated, 842 F.2d 1135 (1988), petition for cert. pending, No. 88-90, has approved the conditional enforcement of summonses, with restrictions on the use of the summoned material. Indeed, both of those decisions cited approvingly the *Texas Heart* decision that was overruled by the en banc court below. See 809 F.2d at 1417; 804 F.2d at 1525-1526. The court of appeals in *Zolin* stated unequivocally that the rule in the Ninth Circuit is that "[a] district court may, when appropriate, condition enforcement of a summons on the IRS's agreeing

[3] The general rule is that compliance with a summons renders moot an appeal from an enforcement order (see, *e.g.*, *United States* v. *Sherlock*, 756 F.2d 1145, 1146 (5th Cir. 1985), and cases cited at Pet. App. A12 n.6), and, indeed, the government originally advised the en banc court of appeals in a supplemental brief that it believed that petitioner's compliance had mooted the case. The court concluded, however, that the case was not moot because there remained a live controversy over whether the district court could attach conditions to the government's use of the summoned material (Pet. App. A10-A18; see also *id.* at A26), and we now agree with that holding.

to abide by disclosure restrictions" (809 F.2d at 1417). Clearly, that rule directly conflicts with the Fifth Circuit's rule stated in the decision below, viz., "[t]he district court does not have the power to conditionally enforce the summons" (Pet. App. A22). Indeed, the Fifth Circuit here expressly acknowledged the conflicting Ninth Circuit authority (*id.* at A25 n.11).

For reasons stated in greater detail in our petition for a writ of certiorari in *Zolin* (at 13-19), we believe that the court below correctly held that the district court lacks the authority in a summons enforcement proceeding to condition enforcement by imposing restrictions upon the IRS's use of the summoned information. Summons enforcement proceedings are intended to be summary and to be limited to determining the IRS's right to obtain the requested information. See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). The summons authority is a broad one, which effectuates "a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis omitted)), and it should not be restricted " 'absent unambiguous directions from Congress' " (*ibid.*, quoting *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975)). The imposition of conditions on the enforcement of a summons—and litigating the question whether such conditions should be imposed—sharply departs from these principles. It greatly expands the district court's limited role of determining whether an IRS summons has been issued in "good faith," and hence whether it should be enforced, into a continuing role as a "monitor [of] the IRS' use of the summoned documents" (*United States* v. *Zolin*, 809 F.2d at 1417).

In our view, the Ninth Circuit's rule authorizing the conditional enforcement of summonses poses a serious threat to the IRS's ability to conduct efficient tax investigations.

Allowing the district court to monitor the IRS's use of the summoned documents and allowing the parties in summons enforcement proceedings to litigate the question whether conditions should be imposed would inject substantial delays into the process that will severely impair the summary nature of summons enforcement proceedings. We therefore agree with petitioner that the issue presented in this case is an important one and that resolution of the conflict in the circuits warrants the attention of this Court. Accordingly, we do not oppose the petition for a writ of certiorari.[4]

CONCLUSION

The petition for a writ of certiorari should be granted or, alternatively, held pending the disposition of the petition in *United States* v. *Zolin*, No. 88-40.

Respectfully submitted.

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JULY 1988

[4] The government's petition for a writ of certiorari in *Zolin* presents two distinct issues on which there are conflicts in the circuits that we believe require resolution by this Court. In addition to the question presented here, the petition in *Zolin* also presents the question whether evidence independent of the communication at issue must be introduced in order to invoke the crime-fraud exception to the attorney-client privilege. Accordingly, we believe the Court should grant that petition and suggest that it may wish to hold this case pending the disposition of *Zolin*.

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NO. 87-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BERNARD M. BARRETT, JR., M.D., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A.,
Petitioner

v.

UNITED STATES OF AMERICA and MICHAEL O. HANSON, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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NO. 87-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BERNARD M. BARRETT, JR., M.D., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A.,
Petitioner

v.

UNITED STATES OF AMERICA and MICHAEL O. HANSON, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Petitioner agrees with the United States that the petition for a writ of certiorari filed herein should be granted and that there is a conflict in the legal rulings of the Fifth and Ninth Circuits with regard to whether a district court may condition enforcement of a summons to protect

section 6103 confidentiality rights. However, petitioner opposes the United States' alternative suggestion in its "Brief For The Respondents," at page 7, footnote 4, that the Court may wish to hold this case (*Barrett*) pending the disposition of *United States v. Zolin,* 809 F.2d 1411 (9th Cir.), reh'g en banc granted, 832 F.2d 127 (9th Cir. 1987), order granting reh'g en banc vacated, 842 F.2d 1135 (9th Cir. 1988), petition for certiorari pending, No. 88-40. There are four basic reasons why the *Barrett* case should be directly heard by this Court and not merely held pending disposition of the *Zolin* case. At the outset of this reply, however, petitioner emphasizes and the United States agrees that there is a clear conflict in the legal rulings between the Ninth and Fifth Circuits in *Barrett* and *Zolin.* The reasons asserted below do not and are not intended to subtract from such conflict, but do demonstrate certain features of the *Barrett* case which do not appear to be present in the *Zolin* case and are features this Court should consider in resolving the conflicting legal rulings of the Ninth and Fifth Circuits. Therefore, for the following reasons the *Barrett* case should be directly heard by this Court and not held pending disposition of the *Zolin* case.

I.

A Jurisdictional Due Process of Law Issue is Present in the *Barrett* Case Which is Not Present in the *Zolin* Case

First, there is a substantial jurisdictional due process of law issue present in the *Barrett* case which does not appear to be present in the *Zolin* case and, as explained in the petition for a writ of certiorari filed herein (pp. 17-20), such jurisdictional due process of law concept pre-

sents a compelling legal reason for resolving the overall question presented in favor of the taxpayer. In *Barrett*, a special agent of the Internal Revenue Service Criminal Investigation Division wishes to utilize the summoned information, i.e., Dr. Barrett's books and records, to obtain the names and addresses of all his patients so that the special agent may continue a mass mailing of letters to 100% of Dr. Barrett's patients, each of which contains the disclosure of the "return information" that Dr. Barrett is under criminal investigation.[1] See 26 U.S.C. § 6103(b)(2)(A) and the dissenting opinion of Fifth Circuit Judge John R. Brown at Pet. App. A-30. Dr. Barrett contends and Judge Brown's dissent makes clear that 26 U.S.C. § 6103(k)(6) does not allow the Internal Revenue Service the power to make such "unnecessary" and massive disclosures. J. Brown, Pet. App. A-36. As Judge Brown's dissent and prior opinions in this case further explain (Pet. App. A-38-39, 67, 70-72), such massive disclosures that a taxpayer is under an administrative criminal investigation is most "damning." Such a mass disclosure to all of a physician's patients is so "damning"

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1. Contrary to the United States' statements in its "Brief For The Respondents" in this case, page 2, and its petition for a writ of certiorari in the *Zolin* case, page 11, the mass circularization previously sent and proposed to be continued by Special Agent Hanson to Dr. Barrett's patients are not "form" letters. In the related civil damage action under 26 U.S.C. § 7431, the Fifth Circuit specifically held that such letters were not "standard I.R.S. letter forms," but were "specially prepared letters that informed each patient that Dr. Barrett was under investigation by the Criminal Investigation Division of the Internal Revenue Service . . ." *Barrett v. U. S.*, 795 F.2d 446, 448 (5th Cir. 1986); Pet. App. A-121. As Judge Brown noted in his dissent in this case, such letters also violated "the instruction in the I.R.S. Manual that 'caution must be exercised not [to] damage the reputation of the taxpayer by making [a mass mailing] either offensive or suggestive of any wrongdoing by the taxpayer'." Pet. App. A-38.

that it constitutes a destruction or taking by the government of all or part of the goodwill of his medical practice, i.e., a "property interest," and substantially interferes with the physician's right to practice his chosen profession, i.e., a "liberty interest." *Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959). The government's position in the *Barrett* case that the Internal Revenue Service may undertake to so destroy a professional citizen of this country, that the citizen is relegated to the post-deprivation remedies of an action for damages under section 7431 and the criminal prosecution of the Internal Revenue Service special agent under section 7213 (*Zolin* pet. at 17), and that federal district courts have no jurisdictional authority to prevent, in advance, such harm and violations of law by the Internal Revenue Service ignores the due process of law clause of the fifth amendment to the U. S. Constitution. *Greene v. McElroy,* 360 U.S. at 492. Such position also ignores the "adequate remedy at law" and "complete protection" this Court in *Reisman v. Caplin,* 375 U.S. 440, 84 S. Ct. 508 (1964), held was available to taxpayers in summons enforcement proceedings initiated by the government and ignores that *Reisman,* therefore, constitutes jurisdictional authority for a district court to provide due process of law protection for a taxpayer's statutory confidentiality rights (section 6103) and constitutional right to privacy. To contend a district court does not have the jurisdiction to provide such due process of law protection of a taxpayer's section 6103 rights and constitutional right to privacy as are involved in the *Barrett* case also ignores this Court's emphasis in *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248 (1964), that federal district courts have the power and obligation to prevent an abuse of their process with regard to an Internal Revenue Service summons.

Petitioner specifically asserted in the district court below the *Reisman* and *Powell* cases as the jurisdictional authority for the district court to provide protection of petitioner's section 6103 rights and constitutional right to privacy and, thereby, the due process of law protection of such type of rights essential to the holdings of *Reisman* and *Powell*. (1-R. 110-111, 115-119, 57-59, 48-56, 10-12). Therefore, because the jurisdictional issue involved in the *Barrett* case includes within it the due process of law issue explained above and in the petition for writ of certiorari filed herein, which does not appear to be present in the *Zolin case*, the *Barrett* case certainly should be directly heard by this Court and not held pending disposition of the *Zolin* case.

II.

The "Return Information" Sought To Be Disclosed In *Barrett* Differs From The "Return Information" Involved In *Zolin*

The *Barrett* case also differs from the *Zolin* case in that in *Barrett* the proposed government conduct is not the disclosure of the summoned information, as is the situation in the *Zolin* case. In *Barrett*, the proposed government conduct is the utilization of the summons and the process of the district court to obtain the names and addresses of all of Dr. Barrett's patients from his books and records so that a mass mailing of letters to all of his patients may take place, each of which contains the unnecessary disclosure of "return information" that he is under a criminal investigation. While there is certainly a conflict in the legal rulings of the Fifth and Ninth Circuits in *Barrett* and *Zolin*, the above described feature of the *Barrett* case is not present in the *Zolin* case and

should be directly considered by this Court in resolving such conflict.

III.

The Fifth Circuit's Majority Opinion Misapplies This Court's Decision in *United States v. Arthur Young & Co.*, Which Error is Not Expressed in the *Zolin* Opinion

The opinion of the Ninth Circuit in *Zolin* does not contain the erroneous majority ruling in the *Barrett* case that section 6103 and its related confidentiality provisions, sections 7213 and 7431, do not constitute "unambiguous directions from Congress" as required by *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502 (1984) and the other prior decisions of this Court discussed therein. The petition for a writ of certiorari filed herein (pp. 20-24) describes such misapplication by the Fifth Circuit of this Court's ruling in *Arthur Young & Co.*, as also recognized by Judge Brown (Pet. App. A-40, 54), and such misapplication should be specifically addressed by this Court in resolving the overall question presented. The decisions of this Court in *Arthur Young & Co.*, *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S. Ct. 915, 921 (1975), *United States v. Euge*, 444 U.S. 707, 715, 100 S. Ct. 874, 880 (1980), and *Donaldson v. United States*, 400 U.S. 517, 535, 91 S. Ct. 534, 544 (1971), do not hold that "unambiguous directions from Congress" can consist only of procedural statutes describing what substantive statutory and constitutional rights may be protected by a district court in an Internal Revenue Service summons enforcement proceeding. All of those cases in-

volved this Court's search for whether an "unambiguous," substantive statutory or constitutional right was being adversely impacted by the Internal Revenue Service summons. Congress' enactment of a "stringent code of confidentiality," to use the words of Judge Brown, constitutes such an "unambiguous direction from Congress" and this Court should correct the Fifth Circuit's error on this point by directly hearing the *Barrett* case. This Court's decision in *Church of Scientology v. I.R.S.*, ____U.S.____, 108 S. Ct. 271 (1987), would certainly appear to construe section 6103 as such an "unambiguous direction from Congress," which is inconsistent with the Fifth Circuit's ruling on this point.

IV.

The Vigorous Dissent of the Split En Banc Decision by The Fifth Circuit in *Barrett* Deserves This Court's Direct Attention

To hold the *Barrett* case pending disposition of the *Zolin* case would not give due attention to the vigorous, studied, and extensively researched dissent led by Fifth Circuit Judge John R. Brown. The *Barrett* case should be decided on its own merits and not by the facts of another case. Judge Brown's dissent thoroughly traces the legislative history of the confidentiality statutes, including Congress' awareness of "the complaints of literally millions of taxpayers concerning abuses in the administration of the I.R.C." and applies the law to the particular facts of Dr. Barrett's case. Pet. App. A-31 (Footnote omitted.) In Judge Brown's application of the law to the facts of the *Barrett case,* it is apparent that the government conduct complained of is most capable of recurring and, therefore, represents an issue of national

importance. Pet. App. A-39. Therefore, the *Barrett* case also should be directly heard by this Court and not held pending disposition of the *Zolin* case because of the work of the dissent and its recognition that the *Barrett* case represents a case of national importance that effects the rights of all taxpayers, i.e., "Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations." J. Brown, Pet. App. A-39.

V.

Conclusion

For the above reasons, petitioner contends the *Barrett* case should be directly heard by this Court in its resolution of the conflicting legal rulings between the Fifth and Ninth Circuits.[2]

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2. The United States' "Brief for the Respondents" erroneously states at page 2 that:

> When an audit of petitioner's personal and corporate income tax returns revealed a $100,000 discrepancy between the amounts deposited into petitioner's bank accounts and the amounts of gross income shown on his tax returns, the Internal Revenue Service (IRS) transferred the case to its criminal division.

A reading of the government's purported supporting citation for such statement, "Pet. App. A-5," however, reveals that the Fifth Circuit's language cited actually states something quite different:

> When the initial investigation uncovered a $100,000 discrepancy between Barrett's books and his bank records, the IRS transferred the case from its civil to its criminal division.

The government has never convinced a court nor a grand jury that Dr. Barrett understated his income, and Dr. Barrett contends one of the reasons why is that the alleged informant was an ex-employee who had an economic interest in damaging Dr. Barrett's medical practice and the alleged informant's information was simply not true. *Barrett v. U. S.*, 795 F.2d 446, 451 (5th Cir. 1986), Pet. App. A-129-130, 1-R8, document pp. 24-25. The relevancy

Respectfully submitted,

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of this point for purposes of this reply memorandum is that the *Barrett* case represents a situation Congress clearly wanted to make illegal in sections 6103, 7213, and 7431, i.e., the use of the IRS and its confidential "return information" by private citizens to gain an advantage over their fellow citizens. (1-R8, document pp. 24-25). Again, the *Zolin* case does not have this particular aspect, which is a feature most capable of recurring on a large scale, and the *Barrett* case should not, therefore, be held pending disposition of the *Zolin* case.